# Before the FEDERAL COMMUNICATIONS COMMISSION Washington, DC 20554

In the Matter of	)	
	)	
Petition of Verizon Telephone Companies	)	
For Forbearance Under 47 U.S.C. §160(c) From	)	WC Docket 04-440
Title II and Computer Inquiry Rules With Respect	)	
To Their Broadband Services	)	

### REPLY COMMENTS OF EARTHLINK, INC.

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#### INTRODUCTION AND SUMMARY

EarthLink, Inc. hereby submits its reply comments to the "Petition of the Verizon Telephone Companies for Forbearance" filed with the Commission on December 20, 2004 ("Petition"). Like BellSouth, Verizon has asked the Commission for relief from all Title II common carriage provisions and Computer Inquiry requirements as they apply to any broadband service offered by Verizon, presumably in every geographic market that Verizon provides such services. The majority of comments in this proceeding recognize that Verizon's extraordinarily broad request suffers from the same substantive and

<sup>&</sup>lt;sup>1</sup> Petition of Verizon Telephone Companies For Forbearance Under 47 U.S.C. §160(c) From Title II and *Computer Inquiry* Rules With Respect To Their Broadband Services, WC Docket 04-440 (filed Dec. 20, 2004).

<sup>&</sup>lt;sup>2</sup> See Petition of BellSouth Telecommunications, Inc. For Forbearance Under 47 U.S.C. §160(c) From Application of Computer Inquiry and Title II Common Carrier Requirements, WC Docket No. 04-405 (filed Oct. 27, 2004).

procedural inadequacies as BellSouth's Petition.<sup>3</sup> Under the plain language of section 10 of the Act, before the Commission can apply the three-part statutory test, the Petitioner must specify: (1) the "provision or regulation" that it requests the Commission to forbear from applying; and (2) the geographic markets in question.<sup>4</sup> Only after the Petitioner does so may the Commission evaluate whether the requested forbearance meets the test established by Congress. In its Petition, although Verizon has specified that it seeks forbearance from Title II in its entirety, it has not made any attempt to apply the section 10 criteria to each of the particular provisions of law included in its blanket request. Moreover, Verizon has not even identified the relevant geographic markets in question, let alone provided any analysis of the competitive landscape within such markets.<sup>5</sup> Accordingly, it is impossible to perform a meaningful evaluation of the effect that forbearance might have, and the Petition must therefore be denied as being facially deficient.<sup>6</sup>

<sup>&</sup>lt;sup>3</sup> See, e.g., Joint CLEC Comments at 1 ("For the same reasons Joint CLECs urged rejection of the similar petition filed by BellSouth, Joint CLECs urge the Commission promptly to reject Verizon's petition. \* \* \* Verizon's petition suffers similar flaws as BellSouth's nearly identical petition."); McLeodUSA Comments at 1-2 (discussing how both petitions should be promptly denied because they rely on the same arguments); Time Warner Telecom Comments at 4 ("The reasons...for the denial of BellSouth's petition apply equally to the denial of Verizon's present petition as well.").

<sup>&</sup>lt;sup>4</sup> See 47 U.S.C. § 160.

<sup>&</sup>lt;sup>5</sup> In addition to the fact that Verizon has failed to identify the specific services in question and their geographic markets, EarthLink has also argued that no ILEC—including Verizon—has addressed and supported with empirical evidence any substantive harm that Title II requirements have had on their ability to offer existing or new services to consumers in a timely fashion. *See*, e.g., EarthLink Reply Comments, Petition of Qwest Corporation For Forbearance Pursuant to 47 U.S.C. § 160(c) Pertaining to Qwest's xDSL Services, WC Docket No. 04-416 (filed Feb. 7, 2005) at 4-6.

<sup>&</sup>lt;sup>6</sup> See, e.g., Joint CLEC Comments at 2 ("Verizon fails to justify forbearance under the standards of Section 10 of the Act. In particular, Verizon fails to provide the rigorous identification and analysis of markets that the courts have required in order for the Commission to forbear from

Even if the Commission does address the merits of Verizon's Petition—and it need not—most commenters in this proceeding, as well as most in the BellSouth forbearance proceeding, have urged the Commission to recognize that the sweeping relief requested by Verizon and BellSouth would provide ILECs the legal right to deny ISPs and CLECs access to the transmission required to deliver any broadband service to end users. Without Commission enforcement of the core obligations in Title II that require common carriers to make transmission available on reasonable and non-discriminatory terms, ILECs would possess both the incentive and the ability to foreclose competition from both independent ISPs (in the information services market) and CLECS (in the telecommunications services market), leaving consumers with little or no choice of high-speed information service and telecommunications service providers in large areas throughout the country.

Turning to the three-part test in section 10, Verizon has first offered no evidence that forbearance from Title II, especially sections 201 and 202, would ensure that the rates and practices by ILECs will be reasonable and nondiscriminatory with respect to the

important statutory and regulatory requirements."); Vonage Comments at 1 (discussing the inadequacies of Verizon's "vastly overbroad" Petition).

<sup>&</sup>lt;sup>7</sup> See, e.g., Joint CLEC Comments at 15 ("[Title II] protections remain as vital backdrops against abuse of any deregulation and provide customers and competitors a forum to air their grievances to the extent they arise."); MCI Comments at ii-iii ("Absent the protections provided by Title II and Computer Inquiry requirements...end users and independent ISPs will be vulnerable to anticompetitive behavior by Verizon."); Michigan Online Group Comments at 3-4 ("As long as Verizon owns the network on which both Verizon an competing broadband providers rely to provide service, Verizon has an incentive to engage in anticompetitive behavior against ISPs and other carriers on whom those ISPs rely.").

<sup>&</sup>lt;sup>8</sup> See 47 U.S.C. §§ 201 and 202.

<sup>&</sup>lt;sup>9</sup> See MCI Comments at ii ("Once freed from common carrier regulations, Verizon could try to restrict competitors' access to end users, effectively preventing end users from enjoying applications or content from specific providers.").

company's provision of transmission services. Second, the Petition fails to explain how such forbearance protects consumers, especially in light of the fact that availability of wholesale transmission is the driving force behind competition in the retail Internet access marketplace. Third, the Petition provides no evidence that such forbearance is in the public interest. It provides no analysis regarding market conditions for wholesale transmission services. It fails to demonstrate how the removal of Title II requirements will have a positive effect on broadband investment and deployment. Finally, it fails to address how forbearance from *all* of Title II—including several sections in the Act aimed at implementing public policy objectives—would be in the public interest.

<sup>&</sup>lt;sup>10</sup> Several Commenters note that Verizon has failed to address the detrimental impact that forbearance would have particularly on rural customers. Given that forbearance would likely increase rates and decrease services for these customers, it is difficult to perceive how forbearance would protect these consumers and therefore be consistent with section 10(a)(2) of the Act. See Joint CLEC Comments at 18-19; Nebraska Rural Independent Companies Comments at 8-11.

<sup>&</sup>lt;sup>11</sup> See Comptel/ASCENT Comments at 1-2 (citing a Verizon-issued news release on strong fourth quarter earnings as evidence of the "fallacy of Verizon's assertions that the Computer Inquiry and Title II common carrier regulations 'prevent' competition and inhibit it from introducing new offerings and responding to new offerings by rivals."); Covad Comments at 8 ("[D]eregulatory action does not produce the Commission's hoped for benefit, ie. increased investment, while it unquestionably limits the ability of competitors like Covad to offer competing broadband services.").

<sup>&</sup>lt;sup>12</sup> See EarthLink Comments at 15 (discussing how Verizon seeks to avoid statutory obligations such as consumer privacy (section 222), E-911 (section 251(e)), universal service (section 254), and access by persons with disabilities (section 255)); see also Joint CLEC Comments at 18 (discussing how rural LECs rely on Universal Service funding to build broadband networks and therefore the "potential impact on rural ILECs precludes the Commission from finding that forbearance would serve the public interest."); MCI Comments at 12 ("Notably absent from Verizon's Petition is a discussion of how universal service would be affected if Verizon's Petition were to be granted."); Sprint Comments at 2 ("[T]here was near unanimity of opinion across the broad telecommunications sector of the economy that...the goal of ensuring access to the telecommunications by Americans with disabilities would be imperiled if the Commission were to do away with Computer Inquiry safeguards."); Vonage Comments at 5-6 ("[T]he relief requested by Verizon may permit it or other LECs to discriminate in favor of their affiliated VoIP offerings through preferential treatment of access to 911 or other critical telecommunications infrastructure. \* \* \* Vonage and other VoIP providers need the cooperation of the LECs to provide optimal 911 service to any customer.").

Thus, it is clear that Verizon has not met the requirements for forbearance under section 10 of the Act. Because Verizon seeks the same forbearance relief as BellSouth, and has essentially made the same arguments in support of its request, EarthLink hereby incorporates its comments and reply comments in the BellSouth proceeding by reference in this proceeding. Similarly, because it is clear that it is Qwest's intention to use any "narrow relief" granted by the Commission to achieve the same anti-competitive and anti-consumer goals sought by BellSouth and Verizon, EarthLink also incorporates its comments in that proceeding by reference as well. Rather than repeat all of the arguments made in those proceedings, EarthLink takes this opportunity to highlight some of the most important issues already addressed by EarthLink and others with respect to Verizon's Petition, as well as to respond to a few remaining issues raised by Verizon. For all of the reasons already articulated by EarthLink and others throughout these ILEC forbearance proceedings, as well as for the additional reasons stated below, the Commission should deny Verizon's Petition.

<sup>&</sup>lt;sup>13</sup> EarthLink Comments, Petition of BellSouth Telecommunications, Inc. For Forbearance Under 47 U.S.C. §160(c) From Application of *Computer Inquiry* and Title II Common Carrier Requirements, WC Docket No. 04-405 (filed Dec. 20, 2004) (hereinafter "EarthLink Comments in Opposition to BellSouth Petition"); EarthLink Reply Comments, Petition of BellSouth Telecommunications, Inc. For Forbearance Under 47 U.S.C. §160(c) From Application of *Computer Inquiry* and Title II Common Carrier Requirements, WC Docket No. 04-405 (filed Jan. 28, 2005) (hereinafter "EarthLink Reply Comments in Opposition to BellSouth Petition"). EarthLink's Reply Comments in Opposition to BellSouth's Petition are included as Exhibit A.

<sup>&</sup>lt;sup>14</sup> EarthLink Comments, Petition of Qwest Corporation For Forbearance Pursuant to 47 U.S.C. § 160(c) Pertaining to Qwest's xDSL Services, WC Docket No. 04-416 (filed Jan. 6, 2005); EarthLink Reply Comments, Petition of Qwest Corporation For Forbearance Pursuant to 47 U.S.C. § 160(c) Pertaining to Qwest's xDSL Services, WC Docket No. 04-416 (filed Feb. 7, 2005). These documents are included as Exhibits B and C, respectively.

## I. The Assertions Regarding the Wholesale and Retail Markets Relied on by the Petition are Insufficient to Meet the Requirements of Section 10.

As EarthLink and several other parties have argued in this and other ILEC forbearance proceedings, the Commission may not grant the forbearance requested by relying on Verizon's anecdotal evidence regarding the "broadband market." The Commission has held that "the first step in assessing what regulatory requirements are appropriate for incumbent LEC-provided broadband services is to define and analyze the relevant markets in which the incumbent LECs provide these services." There are in fact two relevant product markets that must be discussed in this forbearance Petition—the retail consumer market and the wholesale market. Verizon's Petition—similar to the Petitions filed by BellSouth and Qwest—relies solely on assertions regarding retail competition, while providing no analysis on the level of competition in the provision of wholesale transmission services. The reality is that ILECs serve 95% of all xDSL customers, and as Covad notes in its comments, "the incumbent telephone companies and cable providers control more than 93% of the nation's broadband access lines."<sup>17</sup> Because cable providers generally do not sell their transmission services to independent ISPs, in the vast majority of cases those independent ISPs must depend on ILEC facilities to reach their end users. Forbearance from all Title II provisions would eliminate what little competition there is in the wholesale marketplace today. Because little competition

<sup>&</sup>lt;sup>15</sup> See, e.g., Verizon Petition at 2.

 $<sup>^{16}</sup>$  In the Matter of Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services, Notice of Proposed Rulemaking, 16 FCC Rcd. 22,745 at  $\P$  18 (2002).

<sup>&</sup>lt;sup>17</sup> See Covad Comments at 1-2.

exists in the wholesale transmission service market, and ISPs depend upon wholesale transmission services in order to offer retail competition in Internet access services,

EarthLink again asserts—and several parties agree—that the Commission must evaluate the impacts of the wholesale transmission market on the very retail competition that Verizon cites as justification for the forbearance it seeks. 18

Verizon attempts to persuade the Commission to avoid this necessary analysis by suggesting that the "competitive nature of the broadband market will ensure that broadband will be available to wholesale customers at reasonable rates." In support of their Petitions, all ILECs have universally relied on the Commission's 271 Forbearance Order. Verizon and BellSouth assert that, in the 271 Forbearance Order, the Commission rejected the very assertions that EarthLink and others raise with regard to the need to address the lack of competition in the wholesale transmission service market. The reliance on this Order by Verizon and BellSouth to suggest that forbearance is appropriate in these circumstances is mistaken for five significant reasons. First, the requests for relief in the two proceedings are entirely distinct. Unlike in the 271

<sup>&</sup>lt;sup>18</sup> See Verizon Petition at 2 (arguing that Title II provisions are not appropriate "[g]iven the intense intermodal competition in the broadband market today.").

<sup>&</sup>lt;sup>19</sup> *Id.* at 17.

<sup>&</sup>lt;sup>20</sup> See id.; see also Verizon Reply Comments, Petition of BellSouth Telecommunications, Inc. For Forbearance Under 47 U.S.C. §160(c) From Application of Computer Inquiry and Title II Common Carrier Requirements, WC Docket No. 04-405 (filed January 28, 2005) at 8; BellSouth Reply Comments, Petition of BellSouth Telecommunications, Inc. For Forbearance Under 47 U.S.C. §160(c) From Application of Computer Inquiry and Title II Common Carrier Requirements, WC Docket No. 04-405 (filed Jan. 28, 2005) at 2-3.

<sup>&</sup>lt;sup>21</sup> See, e.g., Verizon Petition at 17; BellSouth Reply Comments, Petition of BellSouth Telecommunications, Inc. For Forbearance Under 47 U.S.C. §160(c) From Application of Computer Inquiry and Title II Common Carrier Requirements, WC Docket No. 04-405 (filed Jan. 28, 2005) at 2-3.

Forbearance Order, where the Commission granted relief from section 271 requirements only to a limited set of new fiber network facilities, <sup>22</sup> in the instant Petition Verizon has requested relief applicable to "any broadband services offered by Verizon." As EarthLink explained in its initial comments in this proceeding, because Verizon does not even attempt to define "broadband services" in its Petition, its request for relief on its face applies to all high-speed transmission services, including those transmission services necessary to provide Internet access and voice over Internet protocol ("VoIP") services over any platform. <sup>24</sup> On this point, Covad notes in its comments:

Here, Verizon does not limit its forbearance request to such fiber-containing facilities. Rather, Verizon's petition sweeps broadly to include any ILEC broadband service, whether offered over legacy copper loop plant, legacy hybrid loop plant, or full fiber loop facilities. \* \* \* Having gotten all the fiber deregulation they supposedly once needed to incent further fiber deployment, the Bells arrive yet again at the Commission seeking even more deregulation. <sup>25</sup>

Clearly, Verizon's extremely broad request for relief is not analogous to its own request in the 271 Forbearance Order.

Second, the provisions of law (and therefore the consequences of any forbearance) at issue in each of the two proceedings are simply not the same. As AT&T notes in its comments:

<sup>&</sup>lt;sup>22</sup> See AT&T Comments at 3 (distinguishing the two requests for relief by noting that the Commission only gave Verizon relief to a limited set of fiber facilities, including fiber to the home loops and fiber to the curb loops).

<sup>&</sup>lt;sup>23</sup> Verizon Petition at 1.

<sup>&</sup>lt;sup>24</sup> See EarthLink Comments at 3.

<sup>&</sup>lt;sup>25</sup> Covad Comments at 7.

The 271 Forbearance Order lifted some requirements for access to Bell Operating Company ("BOC") broadband network elements under section 271 of the Telecommunications Act. Notably, however, it did so only because access to network elements used to serve business customers would still be available under section 251 of the Act. In contrast, if the instant Petition were granted, Verizon could claim an unfettered right to deny competitors access to last-mile broadband transmission facilities, or the right to offer any service that it did choose to provide as "private carriage," on any rates, terms, and conditions that it elected.<sup>26</sup>

Despite the fact that there is a tremendous difference between forbearing only from certain network elements availability requirements and forbearing from all Title II provisions in the Act, Verizon and BellSouth nonetheless maintain that any limited findings by the Commission in the 271 Forbearance Order are applicable here.<sup>27</sup> Even a cursory review of the Commission's analysis in the 271 Forbearance Order clearly indicates that both ILECs drastically overstate the scope of the Commission's conclusions in that Order.

Third, and related, the Commission made it very clear in the 271 Forbearance

Order that its findings were "under the particular circumstances relevant to the instant
analysis." The "particular circumstances" that the Commission referred to in that Order
were limited to the requirement to unbundle specific fiber facilities as network elements

<sup>&</sup>lt;sup>26</sup> AT&T Comments at 2-3 (emphasis in original).

<sup>&</sup>lt;sup>27</sup> See Verizon Petition at 17 ("The same is true of the regulations as to which Verizon currently seeks forbearance."); BellSouth Reply Comments, Petition of BellSouth Telecommunications, Inc. For Forbearance Under 47 U.S.C. §160(c) From Application of Computer Inquiry and Title II Common Carrier Requirements, WC Docket No. 04-405 (filed Jan. 28, 2005) at 3 ("The Commission's assertions in that order undercut the key arguments made in the opposing comments here...").

<sup>&</sup>lt;sup>28</sup> In the Matters of Petition for Forbearance of the Verizon Telephone Companies Pursuant to 47 U.S.C. §160(c), et. al., Memorandum Opinion and Order, WC Docket No. 04-48 (rel. Oct. 27, 2004) at ¶ 21 (hereinafter "271 Forbearance Order").

under section 271. As AT&T points out, "neither Title II nor the *Computer Inquiry* rules have anything to do with 'unbundling'; rather, they set forth the rules that have been applied to all common carriers and common carrier services for decades." Whereas the unbundling rules require ILECs to provide access to network elements in order to assist in the development of competition among providers, the common carrier provisions set forth in sections 201 and 202 require *all* common carriers (not just ILECs) to provide their services on reasonable and nondiscriminatory terms, and make it unlawful for common carriers to discriminate with respect to the charges and practices related to such service. They are not the same, and any assertion by Verizon that they are is simply an improper reading of the statute. To this point, The Nebraska Rural Independent Companies state:

The "particular circumstances" that led the Commission to grant forbearance from unbundling obligations are not the same, and thus not relevant as to whether common carriage and *Computer Inquiry* rules should continue to be enforced.<sup>33</sup>

Fourth, Verizon blatantly mischaracterizes the Commission's conclusions regarding the "competitive nature of the broadband market" in an effort to support its own Petition. In the 271 Forbearance Order, the Commission clearly stated that, in concluding forbearance was appropriate in that limited instance, it considered

<sup>&</sup>lt;sup>29</sup> AT&T Comments at 3.

<sup>&</sup>lt;sup>30</sup> See 47 U.S.C. § 271.

<sup>&</sup>lt;sup>31</sup> See 47 U.S.C. § 201.

<sup>&</sup>lt;sup>32</sup> See 47 U.S.C. § 202.

<sup>&</sup>lt;sup>33</sup> Nebraska Rural Independent Companies Comments at 7.

competitive conditions in "the wholesale market *in conjunction with* competitive conditions in the downstream retail broadband market."<sup>34</sup> The Commission did not, as Verizon and BellSouth would prefer, focus *entirely* on the retail product market in determining whether forbearance was appropriate. Regardless of the merits of Verizon's analysis concerning the retail product market, <sup>35</sup> EarthLink and others have repeatedly noted that neither Verizon nor BellSouth has provided any analysis whatsoever on the level of competition in the provision of *wholesale transmission services*. <sup>36</sup> Instead, making the same mistake as BellSouth in its Petition, Verizon argues that because there is some asserted level of competition in the retail marketplace, the statutory requirements in Title II are not necessary to ensure reasonable and nondiscriminatory rates or to protect consumers. <sup>37</sup> Verizon misses the point. Evidence of retail competition is by no means determinative of whether or not it is necessary to retain the essential statutory

<sup>&</sup>lt;sup>34</sup> 271 Forbearance Order at ¶ 21 (emphasis added).

<sup>&</sup>lt;sup>35</sup> As EarthLink has argued, and several others agree, there are only two significant carriers in the broadband transmission marketplace—cable and DSL. As of June 2004, FCC data showed that ADSL and cable accounted for 92.4% of all high-speed lines in the U.S. See FCC High Speed Services for Internet Access: Status as of June 30, 2004, at Chart 2—High-Speed Lines by Technology (rel. Dec. 22, 2004). Despite any claim by Verizon, BellSouth or Qwest that satellite and wireless providers represent comparable alternatives to DSL, there is no question that—whatever their future potential may be—satellite and wireless services are not presently comparable to DSL's availability, reliability, speed, pricing, and consumer demand. See EarthLink Reply Comments in Opposition to BellSouth Petition at 10-11.

<sup>&</sup>lt;sup>36</sup> See FISPA Comments at iii ("No such empirical evidence [regarding wholesale competition] accompanies the Petition, only Verizon's hollow rhetoric."); Joint CLEC Comments at 1 ("Neither Verizon nor BellSouth has acknowledged, much less addressed, that there is no intermodal competition in the wholesale market…"); MCI Comments at ii ("The appropriate focus, however, should be on the wholesale market for Verizon's underlying transmission facilities…"); Time Warner Telecom Comments at 3 ("Joint Commenters and other other parties have shown at length in response to the previously filed petitions for forbearance, the broadband marketplace is *not* fully competitive, and Verizon's powerful incentives to discriminate and engage in cost misallocation remain.").

<sup>&</sup>lt;sup>37</sup> See Verizon Petition at 14 ("[A]pplying Title II common carrier requirements in this age of abundant broadband competition would not be justified...").

requirements that ensure just, reasonable, and nondiscriminatory rates and practices in the wholesale marketplace. This is most obviously the case where, as here, the vast majority of retail competitors rely entirely on the availability of reasonably priced wholesale transmission services in order to deliver their services to customers. Accordingly, without a thorough discussion on the competitive conditions in the wholesale transmission marketplace, Verizon's Petition falls short of what the statute requires. If the 271 Forbearance Order indicates anything relevant to this proceeding at all, it is that Verizon has failed discuss the competitive conditions in the wholesale market "in conjunction with" the competitive conditions in the retail marketplace.

Fifth, in addition to the fact that Verizon and the other ILECs have misstated the reach of the Commission's 271 Forbearance Order, the Commission's analysis in that Order has no empirical support and is directly contradicted by real-world evidence. As a result, it is currently being challenged by several parties. Verizon cites to the Order suggesting that competition in the retail marketplace will somehow "pressure the BOCs to utilize wholesale customers to grow their share of the broadband markets." Initially, EarthLink notes that the Commission provided no support for this statement in its 271 Forbearance Order. Unless Verizon is asserting that it is itself incapable of providing retail services to end users, it is not clear why it would feel the need to use retail competitors (i.e. wholesale customers) in order to reach its optimal mix of price point and market penetration. In fact, even if Verizon could achieve a higher utilization rate for its network by aggressively selling transmission on a wholesale basis, there is no evidence to indicate that it would prefer that business strategy to one, for example, where it served

<sup>&</sup>lt;sup>38</sup> *Id.* at 17.

fewer customers, but charged them higher prices. Additionally, as EarthLink has said time and again, cable is the *only* real-world example of what will happen absent the Title II requirements that Verizon is asking the Commission to forbear from applying. The reality is that cable companies have almost uniformly refused to sell their transmission services to unaffiliated ISPs,<sup>39</sup> and have shown absolutely no evidence of any "pressure" to sell to wholesale customers in order to maximize the utilization of their facilities.<sup>40</sup> The very zeal with which the ILECs have sought to be regulated like cable broadband providers suggests strongly that ILECs would act as the cable companies have acted if the requested relief were granted.

For all of the above reasons, Verizon's reliance on the Commission's 271

Forbearance Order is misplaced. 41

II. Several Assertions Regarding the Relationship of Forbearance to ILEC Market Power Relied Upon By the Petition are Misleading and Insufficient to Meet the Requirements of Section 10.

Among Verizon's primary arguments in support of its Petition is the notion that common carrier obligations are not required because ILECs are "not dominant in any

<sup>&</sup>lt;sup>39</sup> See, e.g., Michigan Online Group Comments at 4 ("Michigan Online's experience is that cable companies do not make wholesale offerings available to potential competitors."); Nebraska Rural Independent Companies Comments at 11 ("Even if ILECs were to claim that they would provide broadband transmission service to independent ISPs, such claims should not be believed. \* \* \* The Commission must not permit itself to be mislead by mere promises of open access, especially when the behavior of major players in the broadband market has demonstrated a propensity to abandon such promises in favor of discriminatory actions.").

<sup>&</sup>lt;sup>40</sup> With the exception of Time Warner Cable, which is required to sell access to a limited number of ISPs under conditions of the AOL/Time Warner merger, no other cable company makes transmission services available to unaffiliated ISPs on any commercially meaningful basis. *See* EarthLink Reply Comments in Opposition to BellSouth Petition at 10.

<sup>&</sup>lt;sup>41</sup> For further discussion on how the *271 Forbearance Order* is not relevant to this proceeding, EarthLink refers the Commission to AT&T's analysis in its opening comments in this proceeding. *See* AT&T Comments at 2-5. *See also* Nebraska Rural Independent Companies Comments at 6-8.

segment of the market," but instead maintain "secondary status" behind cable providers. 42 Many parties, including EarthLink, addressed how the Petition provides no evidence of the state of competition in the wholesale marketplace, and in doing so, grossly understates the leverage that ILECs like Verizon retain in this market. 43 However, there are several other significant issues that must be raised in response to Verizon's "market power" argument. *First*, notwithstanding the fact that Verizon clearly seeks to understate its own market power, nothing in the three-part forbearance test set out in section 10 suggests that a provider's lack of "market power" is grounds for forbearance. 44 As EarthLink stated in its initial comments, the existence of competition may be relevant to the analysis under each part of the test, but the mere presence of competition in and of itself is not sufficient to satisfy the requirements under section 10. 45 It has long been established that discrimination may occur in the absence of market power, which is why the majority of Title II's requirements apply to *all* common carriers.

Second, Verizon erroneously relies on national data to suggest that cable has "market power" in the high-speed Internet access market, and ILECs do not.<sup>46</sup> However, in addressing the relevant geographic market, the Commission has held that "[t]he

<sup>&</sup>lt;sup>42</sup> Verizon Petition at 2, 3.

<sup>&</sup>lt;sup>43</sup> See FISPA Comments at 28-30; Joint CLEC Comments at 4-11; MCI Comments at 6-9; Michigan Online Group Comments at 3-4; NASUCA Comments at 37-41; Time Warner Telecom Comments at 3.

<sup>&</sup>lt;sup>44</sup> See 47 U.S.C. § 160. See also Michigan Online Group Comments at 3 ("Whether Verizon dominates the broadband market with respect to its intermodal broadband competitors is not what the Telecommunications Act requires.")

<sup>&</sup>lt;sup>45</sup> See EarthLink Comments at 9-10.

<sup>&</sup>lt;sup>46</sup> See Verizon Petition at 3-8.

relevant geographic markets for residential high-speed Internet access services are local."<sup>47</sup> Thus, the existence of service alternatives in one locality has no bearing on the analysis regarding the presence or absence of service alternatives in another. Whether or not cable enjoys a larger national market share than DSL matters very little when one considers that not all consumers even have the choice between cable and DSL providers. Werizon has provided no data of the market shares held by both cable and DSL in the local markets where Verizon's DSL services are offered. Similarly, whether broadband over power lines ("BPL") is growing as a competitive provider nationally—as Verizon suggests <sup>49</sup>—is irrelevant in this proceeding if consumers in Verizon territory are not in fact offered BPL as a service alternative. Verizon has offered no data on the availability of alternative technologies in Verizon territory. For the Petition to meet the standards set out in section 10, it must address the competitive alternatives, if they exist at all, in each and every local market for which Verizon seeks forbearance. It has not done so.

*Third*, in support of its assertion that ILECs are secondary providers in the broadband market and therefore are entitled to forbearance, Verizon suggests that

<sup>&</sup>lt;sup>47</sup> In the Matter of Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations by time Warner, Inc. and America Online, Inc. to AOL Time Warner, Memorandum Opinion and Order, 16 FCC Red. 6547 at ¶ 74 (2001).

<sup>&</sup>lt;sup>48</sup> See Covad Comments at 2 ("Cable and DSL "control more than 93% of the nation's broadband access lines. Moreover, many end users lack a choice even amongst this limited set of two providers.").

<sup>&</sup>lt;sup>49</sup> See Verizon Petition at 6.

<sup>&</sup>lt;sup>50</sup> See FISPA Comments at ii (FISPA investigations reveal that "other technology platforms are simply not usable or, in many cases, available to [consumers]."); Nebraska Rural Independent Companies Comments at 4 ("Verizon does not even include data on the market shares of broadband Internet access by type of technology. Rather, the report cited by Verizon only indicates that such services are offered.").

competitive LECs ("CLECs") such as AT&T, MCI, and Sprint all compete for large enterprise customers.<sup>51</sup> EarthLink has already addressed the fact that forbearance from all Title II regulations would mean the Commission must forbear from the requirements of section 251(c)—the provision that Congress explicitly included to require ILECs to permit service by competitive LECs. 52 and therefore CLECs would presumptively be eliminated in those few marketplaces where competition arguably exists.<sup>53</sup> However. Verizon's discussion of these CLECs is also relevant due to the recent announcements that SBC will acquire AT&T, and that both Verizon and Owest are pursuing MCL<sup>54</sup> While none of these acquisitions is final, the Commission nonetheless may not close its eyes to the fact that there is a substantial possibility that these mergers will in fact be finalized in the near future. When such a time arrives, the competitive landscape as it now exists will have dramatically changed as these mergers threaten to eliminate the few potential competitors that remain in the marketplace. Given the timing of these ILEC forbearance proceedings, if the Commission chooses to review Verizon's Petition on the merits, it must specifically address the effect that these mergers will have on competition.

<sup>&</sup>lt;sup>51</sup> See Verizon Petition at 7.

<sup>&</sup>lt;sup>52</sup> See 47 U.S.C. § 251(c). EarthLink questions whether the Commission has the ability to forbear from applying this section at all, because section 10(d) of the Act (47 U.S.C. § 160(d)) requires that section 251(c) be fully implemented in order for the Commission to forbear. Verizon does not discuss this requirement, not does it provide any analysis on this section's level of implementation.

<sup>&</sup>lt;sup>53</sup> See EarthLink Comments in Opposition to BellSouth Petition at 18-20.

<sup>&</sup>lt;sup>54</sup> See AT&T News Release, "SBC To Acquire AT&T," Jan. 30, 2005, available at http://www.att.com/news/2005/01/31-1; Verizon News Release, "MCI May Engage in Further Discussions with Qwest for Two Weeks, Subject to Agreement Provisions," Mar. 2, 2005, available at http://newscenter.verizon.com.

Any review of these ILEC forbearance petitions that fails to address these potential mergers would be legally unsupportable.

Finally, despite any claim by Verizon to the contrary, what is most relevant in this proceeding is the question of whether forbearance from the provisions in the Act that require common carriers to make available their transmission networks will result in discriminatory practices on the part of the ILECs. It cannot be disputed that ILECs possess significant market power in the wholesale transmission marketplace. Several parties have commented in these ILEC forbearance proceedings that in the vast majority of cases, independent ISPs and other enhanced service providers simply do not have any way of providing broadband services without access to ILEC last-mile facilities. Because cable generally does not participate in that wholesale market, it is obvious that ILECs are dominant providers in that critical sector. Therefore, as long as Verizon and other ILECs continue to own and operate the transmission networks essential to provide Internet access services, they have both the incentive and the ability to exclude independent ISPs from access to their networks. Thus, whatever Verizon may say about its "secondary status" vis-à-vis cable, Verizon clearly has the ability to discriminate against information service competitors. Therefore, forbearance from sections 201 and 202—the provisions in the Act that would prevent such discrimination—is not appropriate regardless of Verizon's status as compared to cable.

A recent Order issued by the Commission highlights the importance of Title II in preventing discriminatory practices by telecommunications network providers.<sup>55</sup> In February, VoIP provider Vonage alleged that ILEC Madison River Communication was

<sup>&</sup>lt;sup>55</sup> See In the Matter of Madison River Communications, LLC and Affiliated Companies, Order, File No. EB-05-IH-0010 (Rel. Mar, 3, 2005).

Vonage's VoIP service. In reaching the consent decree that required Madison River to pay a fine and agree not to discriminate against VoIP traffic, Chairman Powell emphasized the importance of keeping telecommunications networks open, saying that the Commission "must adhere to certain consumer protection norms" if Internet applications like VoIP are to remain viable alternatives for all consumers. In the absence of the requirements set forth in Title II, the Commission would have no power to prevent another ILEC like Madison River—or *any* telecommunications service provider for that matter—from engaging in precisely the kind of discriminatory practices that the Commission acted so quickly to foreclose.

## III. The Regulatory Parity Argument Relied On By the Petition is Flawed and Insufficient to Meet the Requirements of Section 10.

Throughout these ILEC forbearance proceedings, Verizon, BellSouth, Qwest, and SBC have each asserted that forbearance from Title II provisions with respect to ILEC broadband service is appropriate because applying Title II to ILECs, but not to cable modem providers, would be unfair to ILECs.<sup>57</sup> All four ILECs suggest that the Commission should forbear from applying Title II requirements to ILECs offering xDSL service for the sake of treating all high-speed Internet access service providers alike.

<sup>&</sup>lt;sup>56</sup> FCC News Release, "FCC Chairman Michael K. Powell Commends Swift Action to Protect Internet Voice Services" (rel. Mar. 3, 2005).

<sup>&</sup>lt;sup>57</sup> See Verizon Petition at 8-11; see also BellSouth Reply Comments, Petition of BellSouth Telecommunications, Inc. For Forbearance Under 47 U.S.C. §160(c) From Application of Computer Inquiry and Title II Common Carrier Requirements, WC Docket No. 04-405 (filed Jan. 28, 2005) at 2; Qwest Comments at 1 ("Qwest believes the persistent regulatory asymmetry is contrary to the public interest..."); SBC Comments at 1 (requesting the Commission "cure this regulatory disparity" between cable modem service and DSL service providers).

EarthLink agrees that providers of broadband telecommunications services should be treated alike; however, the ILECs have it backwards. The appropriate regulatory regime for *both* cable and wireline under the Communications Act is that, to the extent a carrier is providing telecommunications services, including the bundled offering of the telecommunications used to provide information services, that carrier should be treated as a common carrier under the Act.<sup>58</sup> EarthLink and others have consistently opposed the Commission's refusal to apply common carrier requirements to cable. The Commission's analysis for cable modem service was flawed.<sup>59</sup> To follow the erroneous path taken by the Commission in the *Cable Modem Declaratory Order* with respect to DSL would simply compound the Commission's earlier legal and policy mistakes.

#### **CONCLUSION**

Verizon has not met its burden of satisfying the statutory requirements for forbearance under section 10 of the Act. The record in this proceeding, as well as all the ILEC forbearance proceedings, is clear. The prevention of unreasonable and discriminatory practices, protection of consumers' interests, and the public interest all demand that broadband telecommunications services provided by Verizon and other ILECs remain available on reasonable and non-discriminatory terms under Title II of the Communications Act. EarthLink respectfully urges the Commission to maintain the current regulatory framework for the ILEC provision

<sup>&</sup>lt;sup>58</sup> See Brand X Internet Services v. FCC, 345 F.3d 1120, 1127-1128 (9th Cir. 2003).

<sup>&</sup>lt;sup>59</sup> See EarthLink Comments in Opposition to BellSouth Petition at 26-30. This issue is currently before the Supreme Court in FCC v. Brand X Internet Services, et al., 125 S.Ct. 655 (2004).

of broadband services. For the foregoing reasons, Verizon's Petition should be denied.

Respectfully submitted,

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March 10, 2005

## **EXHIBIT A**

# Before the FEDERAL COMMUNICATIONS COMMISSION Washington, DC 20554

In the Matter of	)	
Petition of BellSouth Telecommunications, Inc.	)	
For Forbearance Under 47 U.S.C. §160(c) From	)	WC Docket 04-405
Application of Computer Inquiry and Title II Common Carrier Requirements	)	
Common Carrier requirements	,	

### REPLY COMMENTS OF EARTHLINK, INC.

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## Before the FEDERAL COMMUNICATIONS COMMISSION Washington, DC 20554

In the Matter of	)	
	)	
Petition of BellSouth Telecommunications, Inc.	j	
For Forbearance Under 47 U.S.C. §160(c) From	Ś	WC Docket 04-405
Application of Computer Inquiry and Title II	í	
Common Carrier Requirements	Ś	

#### REPLY COMMENTS OF EARTHLINK, INC.

EarthLink, Inc. hereby submits its reply comments to the "Petition of BellSouth Telecommunications, Inc. for Forbearance" filed with the Commission on October 27, 2004 ("Petition"). As EarthLink and several others pointed out in the initial comments in this proceeding, the Petition essentially asks the Commission to give ILECs unfettered control over their network facilities sufficient to deny ISPs and CLECs access to the essential resource required to deliver any broadband service to end users. Forbearance from the core common carrier obligations in the Communications Act that serve to prevent discrimination<sup>2</sup> would allow BellSouth to curtail, or even eliminate, all competition from ISPs and CLECs that depend on the reasonable and nondiscriminatory rates and terms for this transmission service. Several parties agree that the Petition has blatant deficiencies, both procedurally and substantively. Not only does the Petition fail

<sup>&</sup>lt;sup>1</sup> Petition of BellSouth Telecommunications, Inc. For Forbearance Under 47 U.S.C. §160(c) From Application of *Computer Inquiry* and Title II Common Carrier Requirements, WC Docket No. 04-405 (filed Oct. 27, 2004) (hereinafter "Petition").

<sup>&</sup>lt;sup>2</sup> See 47 U.S.C. §§ 201 and 202.

to conduct an adequate section 10 forbearance analysis for each service and market for which forbearance is sought, as is required by the statute, it does not even identify what specific provisions of law the Commission should forbear from applying. To the extent that it requests the Commission to forbear from applying *all* Title II regulations, the Petition provides no discussion of fundamental provisions in Title II, many of which reflect important public policy objectives, and even some that are necessary for BellSouth to continue to successfully manage its own business.

The majority of comments in this proceeding also recognized that the Petition—likely by design—mischaracterizes the relevant marketplace. BellSouth's Petition relies solely on evidence regarding retail competition, while providing no discussion or analysis on the level of competition in the provision of wholesale transmission services. It is wholesale competition that is necessary to ensure that competitive services continue to reach end users. Perhaps the central issue in this proceeding for competitors like EarthLink, as well as other ISPs and CLECs, is whether there are alternative safeguards within the wholesale product market sufficient to protect against unreasonable or discriminatory rates and practices by LECs—and in particular ILECs like BellSouth—in the absence of the requirements that mandate that ILECS make available the transmission underlying their broadband Internet access service. The Petition offers no discussion whatsoever on this central question. It provides no evidence of the state of competition in the wholesale marketplace, and it grossly understates the market power that ILECs like BellSouth retain in this market. For all these reasons, the Commission must deny the Petition.

Despite these deficiencies, even if the Commission were to review the Petition on the merits—and it should not—it must reject the Petition because BellSouth has failed to satisfy the requirements set out in section 10 of the Communications Act.<sup>3</sup> Section 10 requires the Commission to "deny a petition for forbearance if it finds that any one of the three prongs [of the statutory forbearance test] is not satisfied." The Petition has offered no evidence that forbearance from Title II, and specifically sections 201 and 202, ensure that the rates and practices by ILECs will be reasonable and nondiscriminatory with respect to the company's provision of wholesale transmission services to independent ISPs and CLECs. The Petition also fails to explain how such forbearance protects consumers, especially in light of the fact that such wholesale availability is the driving force behind competition in the retail Internet access marketplace. Finally, the Petition provides no evidence that such forbearance is in the public interest, as it is devoid of any analysis regarding the competitive market conditions in the wholesale marketplace. The vast majority of comments in this proceeding have shown that forbearance from the core common carrier obligations in the Communications Act will without question lead to discriminatory and unreasonable rates and practices by the ILECs, will harm consumers, and is not consistent with the public interest. For all these reasons, the Commission must deny the Petition.

<sup>&</sup>lt;sup>3</sup> See 47 U.S.C. §160.

<sup>&</sup>lt;sup>4</sup> CTIA v. FCC, 330 F.3d 502, 509 (D.C. Cir. 2003).

# I. BELLSOUTH'S PETITION ASKS THE COMMISSION TO MAKE IT LEGAL FOR ILECs TO DISCRIMINATE AGAINST INDEPENDENT ISPs and CLECs.

In this proceeding, and in several others currently before the Commission that will ultimately decide whether competitive ISPs can continue to obtain the necessary transmission services needed to offer information services to consumers, EarthLink has continuously emphasized the central role that independent ISPs have played in bringing choice and competition to consumers in the high-speed Internet access market. It is without question that independent ISPs are vital to the Commission's stated goals of bringing affordable high-speed access to all consumers. As EarthLink argued in its first round of comments, the core purpose of Communications Act, as expressed in sections 201 and 202, is the prevention of discrimination.<sup>5</sup> In asking the Commission to forbear from applying these fundamental requirements to the transmission component of its wireline broadband Internet access service, BellSouth essentially asks the Commission to make it legal for ILECs to discriminate against independent ISPs and CLECs. Due to the breadth of BellSouth's request, the enormous consequences involved, and the Commission's long history regarding the importance of sections 201 and 202.6 many commenters agree with EarthLink that the Commission should deny BellSouth's request in order to preserve the ability of independent ISPs to continue to provide its customers with diverse and innovative information services. On this point, AT&T stated:

The Petition effectively asks the Commission to turn the entire future of wireline broadband services in BellSouth's region over to BellSouth's monopoly control. Thus, the Commission's decision here will determine whether

<sup>&</sup>lt;sup>5</sup> See EarthLink Comments at 18.

<sup>&</sup>lt;sup>6</sup> See id. at 9.

residential and business customers will be served by a dynamic, open, and vibrantly competitive marketplace or by an environment that is dominated by market power.<sup>7</sup>

The Information Technology Association of America ("ITAA") agrees, when it states:

The Commission should make no mistake about what BellSouth is requesting. If the Commission grants BellSouth's petition, the ILECs will have the legal right to refuse to provide broadband telecommunications services — including special access services — to non-affiliated ISPs. If the ILECs choose to provide these services to non-affiliated ISPs, the ILECs will be able to do so at prices, terms, and conditions that are significantly less favorable than those on which they provide the identical services to themselves and their affiliates.<sup>8</sup>

Both the Courts and the Commission have recognized that sections 201 and 202 of the Communications Act represent the core concepts of federal common carrier regulation and are "the centerpiece of the Act's regulatory regime." Sections 201 and 202 are essential to ensure that the rates and practices of ILECs remain reasonable and nondiscriminatory. Instead of providing tangible, empirical evidence to support its claim that consumers and independent ISPs have sufficient competitive alternatives so that Title II requirements are not needed to prevent anti-consumer and anti-competitive practices and rates, BellSouth asks the Commission to rely on no more than mere promises not to

<sup>&</sup>lt;sup>7</sup> AT&T Comments at i.

<sup>&</sup>lt;sup>8</sup> ITAA Comments at 2. See also CISPA Comments at 6 ("By granting BellSouth's Petition, the FCC would be deterring competition in this market and encouraging the ILECs and their own ISP affiliates to become the sole source of information services provided by DSL.").

<sup>&</sup>lt;sup>9</sup> See MCI v. AT&T, 512 U.S. 218, 220 (1994); see also In the Matter of PCIA Petition for Forbearance for Broadband Personal Communications Services, 13 FCC Rcd. 16,857 at ¶15 (1998).

discriminate against ILECs and CLECs.<sup>10</sup> The Commission may not rely on such vague promises to support forbearance under section 10. As EarthLink and others stated in their comments, the Commission has often recognized the importance of these sections and has never before relieved any common carrier from compliance with sections 201 and 202.<sup>11</sup> Given the magnitude of BellSouth's request, and the lack of evidence offered to support it, it must rely on its own precedent and reject the Petition.

# II. THE COMMISSION SHOULD DISMISS THE PETITION BECAUSE BELLSOUTH'S REQUEST FOR RELIEF IS OVERBROAD, VAGUE, AND NOT SUPPORTED BY SUFFICIENT EVIDENCE.

Section 10 of the Communications Act provides that "the Commission shall forbear from applying any regulation or any provision of this Act to a telecommunications carrier or telecommunications service, or class of telecommunications carriers or telecommunications services, in any or some of its or their geographic markets" if the Commission determines all three forbearance criteria are satisfied.<sup>12</sup> The plain language of the statute requires the Petitioner to specify: 1) the "provision or regulation" that it requests the Commission to forbear from applying, and 2) the geographic markets in question.<sup>13</sup> EarthLink and others noted in their comments

<sup>&</sup>lt;sup>10</sup> See, e.g., BellSouth Petition at 6. See also AT&T Comments at 4 ("BellSouth asks the Commission to de-regulate first, based on vague promises of future fair play, and only ask questions later, without regard for the consequences on customers, competition, or the public interest."); McLeodUSA Comments at 23 ("While the Commission should not grant the requested forbearance in any event, the Commission may not do so based on the unsupported promises of BellSouth that it will not harm competition.").

<sup>&</sup>lt;sup>11</sup> See EarthLink Comments at 9-10; AT&T Comments at 12-15.

<sup>12 47</sup> U.S.C. § 160.

<sup>&</sup>lt;sup>13</sup> *Id* 

that BellSouth's Petition fails in all respects to do either, and therefore its analysis is procedurally deficient. In support of this, McLeodUSA states:

[T]he statute expects that the petition and the Commission's analysis will be sufficiently granular and will not make broad sweeping regulatory pronouncements where narrower findings are more appropriate.<sup>14</sup>

BellSouth's extraordinarily broad request precludes the Commission from fulfilling its statutory duty to consider forbearing from specific provisions or regulations as they apply to services within specific geographic markets. The Commission is given no basis at all upon which it could make the factual findings necessary to support a forbearance request. With no discussion of the statutory provisions or the geographic markets at issue, it is impossible for either the Commission or interested parties to assess the consequences of forbearance, and for this reason the Petition must be denied.

In addition to these procedural deficiencies, perhaps the most fatal flaw in BellSouth's request is that the Petition relies on evidence of the wrong product market to support its request for forbearance. To support its forbearance request, BellSouth essentially makes two arguments. First, because there is evidence of competition in the retail marketplace, the statutory requirements in Title II are not necessary to ensure reasonable and nondiscriminatory rates or to protect consumers. Second, common carrier obligations are not required because ILECs do not have "market power in broadband transmission." As virtually all of the commenters that opposed the Petition

<sup>&</sup>lt;sup>14</sup> McLeodUSA Comments at 7.

<sup>15</sup> BellSouth Petition at 3.

<sup>&</sup>lt;sup>16</sup> *Id.* at 29.

recognized, both of these arguments fail to address the facts that: 1) there are *two* relevant markets that must be discussed in this forbearance Petition—the retail consumer market (which is correctly regulated already) and the wholesale transmission market, 2) evidence of retail competition has absolutely no relevance regarding whether or not it is necessary to retain the essential statutory requirements that ensure just, reasonable, and nondiscriminatory rates and practices in the wholesale marketplace, and 3) there is currently no competition in the wholesale marketplace and as a result ILEC-owned facilities are the primary means for independent ISPs and CLECs to access their customers.

The wholesale marketplace for underlying transmission services is not competitive. In its Petition, BellSouth not only does not contest this reality, it fails to discuss the wholesale marketplace at all. Numerous parties have pointed out that BellSouth's analysis focuses only on the competitive alternatives that end users have in the retail Internet access services product market. <sup>17</sup> As EarthLink argued in its comments, unaffiliated ISPs largely depend on ILEC broadband transmission facilities to provide high-speed Internet access to its customers. <sup>18</sup> In response to comments in this proceeding from Qwest that "LEC facilities are not essential to the provision of enhanced services [because ISPs] may purchase broadband transmission services from entirely distinct platform providers, including cable modem providers, wireless providers and

<sup>&</sup>lt;sup>17</sup> See AT&T Comments at 3; CISPA Comments at 2-3; COMPTEL/ASCENT Comments at 12-13; ITAA Comments at 3-5; MCI Comments at 1-4; McLeodUSA Comments at 8; Local Government Coalition Comments at 8-9; Time Warner Telecom Comments at 16; Vonage Comments at 3.

<sup>&</sup>lt;sup>18</sup> See EarthLink Comments at 19-20.

satellite providers, as well as from CLECs,"<sup>19</sup> the majority of comments recognize that independent ISPs largely depend on ILEC facilities, and forbearance from all Title II provisions would literally leave *no competition* in the wholesale marketplace. In support of this, ITAA states:

BellSouth, however, has completely ignored the wholesale market. ISPs that do not own their own facilities, but which seek to provide broadband information services to mass market customers, must obtain broadband transmission service. In most cases, ISPs have no viable alternative but to obtain this service from an ILEC. Cable systems do not provide intermodal competition in the wholesale mass market broadband telecommunications market. To the contrary, no cable system offers a generally available wholesale broadband transmission service that ISPs can use to serve their mass market retail customers.<sup>20</sup>

### In addition, AT&T argues:

BellSouth has not offered a shred of evidence showing the existence of a widespread wholesale market for the "underlying basic service[s]" that competitors need to provide their retail services. And in fact the evidence is totally to the contrary. In the vast majority of cases, independent ISPs and other enhanced service providers simply do not have any way of providing broadband services without access to incumbent LEC last-mile facilities, because they rarely have access to competitive alternatives. Regardless of any retail services they may offer, cable providers do not provide adequate wholesale broadband access alternatives to constrain incumbent LECs' market power over inputs needed by non-affiliated broadband providers.<sup>21</sup>

<sup>&</sup>lt;sup>19</sup> Qwest Comments at 4.

<sup>&</sup>lt;sup>20</sup> ITAA Comments at 6 (emphasis in original).

<sup>&</sup>lt;sup>21</sup> AT&T Comment at 32.

In its comments, Qwest claims that ISPs are not dependent on LEC broadband transmission, and that this "is demonstrated by simply looking at EarthLink's web page, where the company offers customers 'EarthLink cable,' 'EarthLink satellite,' and 'EarthLink DSL.'"<sup>22</sup> Qwest's argument fails for three reasons. *First*, with the exception of Time Warner Cable, which is required to sell access to ISPs under conditions of the AOL Time Warner merger, <sup>23</sup> EarthLink's experience and the undisputed evidence shows that no other cable company has been willing to offer transmission services to unaffiliated ISPs on any commercially meaningful scale. *Second*, because forbearance from all Title II regulations would mean the Commission must forbear from the requirements of section 251(c)—the provision that Congress explicitly included to require ILECs to permit service by competitive LECs, CLECs would also presumptively be eliminated in those few marketplaces where wholesale facilities-based competition arguably exists. <sup>24</sup> *Third*, despite any claim by BellSouth or Qwest that satellite and wireless providers represent comparable alternatives to DSL, there is no question that—whatever their *future* potential may be—satellite and wireless services are not *presently* 

<sup>&</sup>lt;sup>22</sup> Qwest Comments at 4-5.

<sup>&</sup>lt;sup>23</sup> See In the Matter of America Online, Inc. and Time Warner Inc., FTC Docket No. C-3989, Agreement Containing Consent Orders; Decision and Order, 2000 WL 1843019 (FTC) (proposed Dec. 14, 2000) and Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations by Time Warner Inc. and America Online, Inc., Memorandum Opinion and Order, CS Docket No. 00-30 (rel. Jan. 22, 2001).

<sup>&</sup>lt;sup>24</sup> As stated in its comments, EarthLink questions whether the Commission has the ability to forbear from applying this section at all, because section 10(d) of the Act (47 U.S.C. § 160(d)) requires that section 251(c) be fully implemented in order for the Commission to forbear. Therefore, in order for the Commission to take any action, the Petitioner must address, as a preliminary matter, whether section 251(c) has been fully implemented. It has not.

comparable to DSL's availability, reliability, speed, pricing, and consumer demand.<sup>25</sup> If the above information cited by Qwest is evidence of anything at all, it is evidence of the fact that EarthLink is only able to provide broadband services to its consumers because the Title II safeguards currently in place ensure that ILECs continue to make available the transmission component of its wireline broadband Internet access service on reasonable and non-discriminatory terms.

Finally, to the extent that BellSouth and other ILECs argue that common carrier obligations are not required because ILECs do not have "market power in broadband transmission," the comments opposing the Petition universally show that ILECS do in fact retain substantial market power in the wholesale marketplace because in most cases there are no alternatives for ISPs to obtain the underlying transmission component of broadband Internet access service. Thus, BellSouth's claim that ILECs somehow lack market power is just not true. In support of this, MCI states:

As long as the carriers that own the broadband transmission networks can exercise market power because transmission is not yet available on a competitive basis, they will exercise that market power by controlling downstream markets that depend on those transmission services.

BellSouth and other ILECs possess significant market power in the wholesale transmission marketplace, and as a result, have both the ability and incentive to use this

<sup>&</sup>lt;sup>25</sup> See CISPA Comments at 5; ITAA Comments at 7; MCI Comments at 7; McLeodUSA Comments at 19.

<sup>&</sup>lt;sup>26</sup> See BellSouth Petition at 29; see also Qwest Comments at 5; SBC Comments at 1-3.

<sup>&</sup>lt;sup>27</sup> See AT&T Comments at 38-39; CISPA Comments at 7; COMPTEL/ASCENT Comments at 13; ITAA Comments at 3-5; MCI Comments at 3; McLeodUSA Comments at 19; Local Government Coalition at 14-15; Time Warner Telecom Comments at 3-4; Vonage Comments at 16-21.

market power to exclude independent ISPs from access to their networks. Thus, forbearance from sections 201 and 202—the provisions in the Act that would prevent such discrimination—is not appropriate.

- III. THE COMMISSION SHOULD DISMISS THE PETITION BECAUSE IT DOES NOT MEET ANY OF THE CRITERIA NECESSARY FOR FORBEARANCE UNDER SECTION 10.
  - a. The Petition Fails to Show That Title II Obligations Are Not Necessary to Ensure that ILEC Rates and Practices Will Be Reasonable and Nondiscriminatory.

The first prong of the section 10 forbearance test requires the Petitioner to demonstrate that "enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory." Thus, the statute requires BellSouth to demonstrate that Title II regulations—in particular, those designed specifically to prevent discrimination<sup>29</sup>—are not necessary to ensure just, reasonable, and nondiscriminatory rates, terms, and conditions for access to ILEC wholesale transmission facilities. The Petition relies solely on the unsupported premise that "competition is the most effective means of ensuring that the charges, practices, classifications, and regulations" of BellSouth and other ILECs remain just, reasonable and nondiscriminatory. However, because the Petition completely ignores the lack of

<sup>&</sup>lt;sup>28</sup> 47 U.S.C. § 160(a)(1).

<sup>&</sup>lt;sup>29</sup> 47 U.S.C. §§ 201 and 202.

<sup>&</sup>lt;sup>30</sup> BellSouth Petition at 17.

competition in the wholesale marketplace, it has not met its burden of showing that Title II regulations are not necessary to prevent unjust and unreasonable discrimination against ISPs and competitive LECs. BellSouth did not and cannot show that wireline or other alternatives exist for ISPs sufficient to support the forbearance from sections 201 and 202 of the Communications Act. Moreover, as several parties have demonstrated in their comments, BellSouth and other ILECs have in fact indicated that they are both willing and able to discriminate against, and even exclude independent ISPs from their networks.<sup>31</sup> For these reasons, BellSouth has failed in all respects to satisfy the requirements of section 10(a)(1) of the Communications Act.

#### b. Forbearance From Title II Regulations Will Harm Consumers.

The second prong of the section 10 forbearance test requires the Petitioner to demonstrate that "enforcement of such regulation or provision is not necessary for the protection of consumers." Forbearance from sections 201, 202, and 251 of the Communications Act, as stated above in section II, would eliminate all competition in the wholesale transmission marketplace. This, in turn, would substantially harm the retail consumer, because the driving force behind competition in the *retail Internet access* marketplace has always been *wholesale transmission availability*. As EarthLink stated in its comments, the distinct question for the Commission to decide under this prong is whether the benefits of regulation, including the benefits of competition in the information services market that come from the enforcement of sections 201 and 202, are

<sup>&</sup>lt;sup>31</sup> See, e.g., CISPA Comments at 9; ITAA Comments at 13.

<sup>&</sup>lt;sup>32</sup> 47 U.S.C. § 160(a)(2).

outweighed by specific and quantified regulatory costs and harms.<sup>33</sup> Neither BellSouth nor any other ILEC supporting the Petition<sup>34</sup> has provided any evidence that Title II regulations have any effect on consumer costs, and that the balance tips in favor removing the requirements that Congress set in place to protect consumers. 35 If in fact Title II regulations did result in increased costs for consumers, BellSouth has failed to reconcile how broadband Internet access over cable is currently an unregulated service. but still charges the consumer substantially more per month for its service than DSL, a regulated service.<sup>36</sup> BellSouth's vague and unsupported claim that deregulation will somehow result in lower prices for consumers is directly contradicted by real-world experience in the marketplace. If the Commission were to grant BellSouth the relief that it requests, ILECs would have the ability and incentive to exclude independent ISPs from their networks, which ultimately is to the detriment of all retail customers. By undermining ISP competition through forbearance from Title II of the Act, it is clear that consumers will not have the full benefits of competition, such as competitive pricing and diverse advanced service offerings, which is what ultimately drives consumer demand for high-speed Internet access services.

<sup>&</sup>lt;sup>33</sup> See EarthLink Comments at 23.

<sup>&</sup>lt;sup>34</sup> See Qwest Comments at 7; SBC Comments at 11.

<sup>35</sup> See, e.g., AT&T Comments at 44; COMPTEL/ASCENT Comments at 14.

<sup>&</sup>lt;sup>36</sup> The base price for BellSouth "FastAccess DSL" service as listed on BellSouth's website is \$34.95. See BellSouth website, available at https://www.fastaccess.com/content/consumer/products.jsp#dsllite. In comparison, the base price for Comcast's High-Speed Internet Service as listed on its website is \$57.95 (for consumers that do not also purchase cable television services). See Comcast website, available at http://www.comcast.com/Benefits/CHSIBenefits.asp.

# c. Forbearance From Title II Regulations is Not Consistent With the Public Interest.

Section 10(a)(3) of the Act requires a Petitioner to demonstrate that "forbearance from applying such provision or regulation is consistent with the public interest."37 Section 10(b) of the Act states that in making a public interest determination, the Commission "shall consider whether forbearance from enforcing the provision or regulation will promote competitive market conditions, including the extent to which such forbearance will enhance competition among providers of such telecommunications service."38 BellSouth has not demonstrated that forbearance from Title II of the Communications Act is consistent with the public interest for four reasons. First. BellSouth's reliance on section 706 to support a public interest analysis under section 10(a)(3) is unsupported because section 706 is not an independent grant of forbearance authority.<sup>39</sup> BellSouth cannot make up for its inability to meet the requirements of section 10 by relying on section 706 to support its forbearance request. 40 Second, as stated above, BellSouth provides no analysis as to how forbearance will promote competition in the wholesale transmission marketplace. In fact, the evidence clearly suggests that forbearance from all Title II provisions would have the direct opposite effect. Third, BellSouth seeks to avoid many statutory obligations that are in the public

<sup>&</sup>lt;sup>37</sup> 47 U.S.C. § 160(a)(3).

<sup>&</sup>lt;sup>38</sup> 47 U.S.C. § 160(b).

<sup>&</sup>lt;sup>39</sup> See In the Matters of Deployment of Wireline Services Offering Advanced Telecommunications Capability, 13 F.C.C.R. 24,012, 24,044 at ¶ 69 (1999); see also AT&T Comments at 48 (stating that the Bells themselves have acknowledged that section 706 grants the Commission no independent authority).

<sup>&</sup>lt;sup>40</sup> See MCI Comments at 9-10 (stating that BellSouth seeks to compensate for its failure to adequately address the requirements of section 10 by relying on section 706 of the Act).

interest, such as consumer privacy (section 222), E-911 (section 251(e)), universal service (section 254), and access by persons with disabilities (section 255). BellSouth has offered no analysis to demonstrate how forbearance from these provisions—which are aimed at implementing public policy objectives—is in the public interest. Fourth, BellSouth has not demonstrated how removing Title II common carrier requirements will have any effect on overall broadband investment or deployment. In fact, the evidence seems to show that Title II requirements in no way affects BellSouth's investment in wireline broadband services.

For all these reasons, it is clear that the forbearance that BellSouth has requested is not in the public interest.

#### **CONCLUSION**

BellSouth's Petition suffers from fatal procedural and substantive deficiencies. Furthermore, the Petition fails in all respects to satisfy the requirements for forbearance under section 10 of the Communications Act. EarthLink and several other parties to this proceeding have shown that the prevention of unreasonable and discriminatory practices by ILECs, the protection of consumers' interests, and the public interest all demand that the transmission component of wireline broadband services provided by BellSouth and

<sup>&</sup>lt;sup>41</sup> See AT&T Comments at 17-21; Local Government Coalition Comments at 21-22.

<sup>&</sup>lt;sup>42</sup> See Vonage Comments at 24-25 (Title II safeguards promote competition and do not stifle investment).

<sup>&</sup>lt;sup>43</sup> See EarthLink Comments at 25 (In the absence of regulatory relief, BellSouth recently spent an estimated \$2 billion to provide its customers with Internet access over the next two to three years).

other ILECs remain available on reasonable and nondiscriminatory terms under Title II of the Communications Act. BellSouth's Petition must be denied.

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January 28, 2005

## **EXHIBIT B**

# Before the FEDERAL COMMUNICATIONS COMMISSION Washington, DC 20554

In the Matter of	)	
Patition of Owast Comparation for Forhamens	Ì	WC Darley 04 41 C
Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. §160(c) Pertaining to	)	WC Docket 04-416
Qwest's xDSL Services	)	

### COMMENTS OF EARTHLINK, INC. IN OPPOSITION TO THE PETITION

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In the Matter of	)	
	)	
Petition of Qwest Corporation for Forbearance	)	WC Docket 04-416
Pursuant to 47 U.S.C. §160(c) Pertaining to	Ś	
Qwest's xDSL Services	j j	

### COMMENTS OF EARTHLINK, INC. IN OPPOSITION TO THE PETITION

#### INTRODUCTION

EarthLink, Inc. opposes the "Petition of Qwest Corporation for Forbearance" filed with the Commission on November 10, 2004 ("Petition"). In its Petition, Qwest has requested that the Commission exercise its statutory authority under section 10 of the Communications Act to forbear from applying dominant carrier tariff regulation, rate averaging requirements, and requirements that mandate resale to competitive local exchange carriers ("CLECs") at an avoided cost discount for its xDSL services.

EarthLink is one of the nation's leading Internet service providers ("ISPs"), with approximately 5.4 million total customers, of which approximately 1.3 million are broadband customers. EarthLink seeks to provide Internet access to its broadband customers using every available transmission network, including DSL, cable, satellite,

<sup>&</sup>lt;sup>1</sup> Petition of Qwest Corporation For Forbearance Pursuant to 47 U.S.C. § 160(c) Pertaining to Qwest's xDSL Services, WC Docket No. 04-416 (filed Nov. 10, 2004).

and wireless. Because EarthLink is one of many competitors in the high-speed Internet access marketplace that does not own the transmission networks that makes delivery of information services possible, it has a fundamental interest in this proceeding.

The consumer's ability to choose from a range of competitive ISPs depends on those ISPs' ability to obtain the necessary transmission services from facilities-based wholesale providers like Qwest, and from CLECs that, on reasonable and nondiscriminatory terms and conditions, obtain underlying transmission from Qwest and other incumbent LECs ("ILECs"). Currently, Qwest and other ILECs provide this wholesale transmission under tariff and at an avoided cost discount to CLECs. The Petition fails to demonstrate that these regulations harm Qwest's ability to deploy its current service or any new service to its consumers. Instead, the forbearance that Qwest seeks in this Petition is simply an effort to allow Qwest to curtail or eliminate competition from ISPs and CLECs by giving Qwest the right to avoid tariff requirements and to demand discriminatory rates and terms for its transmission service.

In support of its Petition, Qwest relies primarily on a vague discussion of "robust competition in the mass-market broadband services" marketplace<sup>2</sup> to suggest that forbearance is appropriate.<sup>3</sup> However, the Commission has recognized that the retail services product market is distinct from the wholesale product market.<sup>4</sup> As EarthLink explains in greater detail below, forbearance from the regulations under consideration in this Petition would threaten the ability of ISPs and CLECs to obtain essential wholesale

<sup>&</sup>lt;sup>2</sup> See, e.g., Qwest Petition 14-15.

<sup>&</sup>lt;sup>3</sup> See id. at 12.

<sup>&</sup>lt;sup>4</sup> In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Capability, Second Report and Order, 1999 WL 1016337, at ¶ 8 (1999) (hereinafter Advanced Telecommunications Capability Second R&O).

transmission service. This fact, combined with the reality that cable providers (with certain limited exceptions) refuse to sell transmission service to unaffiliated ISPs, means the relief requested could effectively close the wholesale transport market relied upon by ISPs. This would substantially harm the retail consumer, because the driving force behind competition in the *retail Internet access* marketplace has always been *wholesale transmission availability*. Without the regulations in question, Qwest would have every incentive and ability to foreclose competition from independent ISPs, leaving retail consumers in Qwest territory with little or no choice in high-speed Internet providers. At best, such consumers could choose between high-speed DSL service offered by Qwest and high-speed cable modem service provided by a cable company, if such a choice is even available.

Qwest has not met the burden of showing that section 10 of the Communications

Act permits the forbearance that it requests. The appropriate regulatory response by the

Commission is to enforce dominant carrier tariffing and tariff review, and to require that

Qwest continue to sell transmission service at an avoided cost discount to CLECs.

Accordingly, the Petition should be denied.

#### **DISCUSSION**

#### I. SECTION 10 OF THE COMMUNICATIONS ACT

The Communications Act provides the Commission with regulatory flexibility by giving it the authority under section 10 to forbear from applying, in specific circumstances, any regulation or provision in the Act that is applicable to

telecommunications carriers or services.<sup>5</sup> In its Petition, Qwest requests that the Commission use its section 10 authority to forbear from applying dominant carrier tariff regulation, rate averaging requirements, and the requirements to resell its transmission services to CLECs at an avoided cost discount. Before the Commission may exercise its forbearance authority, the petitioner bears the burden of showing that all of the requirements in the three-part test established by Congress are met:<sup>6</sup>

- (a) Notwithstanding section 332(c)(1)(A) of this Act, the Commission shall forbear from applying any regulation or any provision of this Act to a telecommunications carrier or telecommunications service, or class of telecommunications carriers or telecommunications services, in any or some of its or their geographic markets, if the Commission determines that-
  - (1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory;
  - (2) enforcement of such regulation or provision is not necessary for the protection of consumers;
  - (3) forbearance from applying such provision or regulation is consistent with the public interest.<sup>7</sup>

Where petitioners provide only a cursory analysis of how the three forbearance tests are satisfied, the Commission has rejected forbearance petitions for a lack of legal

<sup>&</sup>lt;sup>5</sup> 47 U.S.C. § 160.

<sup>&</sup>lt;sup>6</sup> See Petition of Ameritech Corporation for Forbearance from Enforcement of Section 275(a) of the Communications Act of 1934, As Amended, Memorandum Opinion and Order, 15 FCC Red. 7066, at ¶ 7 (1999).

<sup>&</sup>lt;sup>7</sup> 47 U.S.C. § 160.

and factual support for the relief requested.<sup>8</sup> The Commission held in its *Fixed Wireless Forbearance Order* that "the decision to forbear from enforcing statutes or regulations is not a simple decision, and must be based upon a record that contains more than broad, unsupported allegations of why the statutory criteria are met." It held that it could not forbear "in the absence of a record that would permit [it] to determine that each of the tests set forth in Section 10 is satisfied..." The Petition does not meet this standard.

In its Petition, Qwest argues that the existence of "robust intermodal competition" in the broadband services marketplace satisfies all three prongs of the above test. 11 This suggestion is incorrect. Because the section 10 test is stated in the conjunctive, before the Commission may lawfully forbear from applying any of the Act's provisions, it must satisfy each of the three parts of that test. Although the existence of competition may be relevant to the analysis under each part, competition in and of itself is not sufficient to satisfy the requirements under section 10. The language of section 10(b) provides that the Commission must consider "competitive market conditions" in making a public interest determination under section 10(a)(3), and further provides that a finding that forbearance would enhance competition among providers of telecommunications services "may be the basis of a Commission finding that forbearance is in the public interest." 12

 $<sup>^8</sup>$  See e.g., Petition of Core Communications, Inc. for Forbearance under 47 U.S.C. § 160(c) from Application of the ISP Remand Order, Order, 19 FCC Red. 20179, at ¶ 16 (2004).

<sup>&</sup>lt;sup>9</sup> In the Matter of Forbearance from Applying Provisions of the Communications Act to Wireless Telecommunications Carriers, First Report and Order, 15 FCC Rcd. 17414, at ¶ 13 (2000) (hereinafter Fixed Wireless Forbearance Order) (internal citations omitted).

<sup>&</sup>lt;sup>10</sup> *Id*.

<sup>11</sup> See Qwest Petition at 13, 20, 23.

<sup>&</sup>lt;sup>12</sup> 47 U.S.C. § 160(b) (emphasis added).

Thus, under section 10(b), although the Commission must consider the effect on competition, a finding that forbearance will enhance competition is not dispositive even under a third prong analysis. The specific reference in section 10(b) to section 10(a)(3) demonstrates that a finding that forbearance would enhance competition—without more—is not adequate to satisfy the requirements under the first two parts of the test set forth in section 10(a)(1) and 10(a)(2). Therefore, because Qwest relies on the premise that competition by itself is sufficient to satisfy a forbearance analysis, the Petition is inadequate on its face, and for this reason alone it should be denied. In any event, as EarthLink demonstrates below, the competition that Qwest claims as the basis for its Petition simply does not exist.

# II. THE COMMISSION MAY NOT FORBEAR FROM APPLYING DOMINANT CARRIER TARIFF REGULATION TO QWEST'S xDSL SERVICES.

Qwest: 1) to provide cost support, <sup>13</sup> 2) to file a tariff on 15-day's notice before implementing a price increase, <sup>14</sup> 3) to wait 30 days after a price change before implementing a further price change, <sup>15</sup> and 4) forbid Qwest from offering contract tariffs. <sup>16</sup> The Supreme Court has repeatedly held that the tariff filing requirement is the primary tool chosen by Congress to prevent unreasonableness and discrimination in

<sup>&</sup>lt;sup>13</sup> 47 C.F.R. § 61.38.

<sup>&</sup>lt;sup>14</sup> 47 U.S.C. § 204(a)(3) and 47 C.F.R. § 61.58.

<sup>15 47</sup> C.F.R. § 61.59.

<sup>&</sup>lt;sup>16</sup> 47 C.F.R. § 61.3(o).

charges.<sup>17</sup> The Court has held that "the duty to file rates...and the obligation to charge only those rates, have always been considered essential to preventing price discrimination and stabilizing rates."<sup>18</sup> Dominant carrier tariff requirements serve to protect both wholesale ISP and CLEC competitors, as well as retail consumers, from any potential pricing and competitive abuses by ILECs.

Despite the significance of the dominant carrier tariff filing requirements, Qwest has failed to address any substantive harm that these requirements have on its ability to offer existing or new services to consumers in a timely manner. All ILECs that offer wholesale DSL transport service via the FCC's dominant carrier tariff filing process make frequent changes to their tariffs with little difficulty. Qwest cites only the *possibility* of delays and expenses that are associated with tariff filing, <sup>19</sup> but offers no actual examples of such delays or expenses, or how they affect Qwest's ability to offer its services to its subscribers. To the contrary, the evidence suggests that the ADSL service that is subject to dominant carrier tariff requirements has had enormous success over its "non-regulated" CLEC counterparts. Recent FCC data shows that, of all ADSL lines, ILECs have a 95% market share compared to the 5% share owned by CLECs.<sup>20</sup> Qwest's Petition offers no evidence to rebut the presumption that dominant carrier tariff

See MCI v. AT&T, 512 U.S. 218, 230 (1994); Maislin Industries Inc. v. Primary Steel, Inc., 497
 U.S. 116, 126 (1990); Texas & Pacific R. Co. v. Abilene Cotton Oil Co., 204 U.S. 426, 440 (1907).

<sup>&</sup>lt;sup>18</sup> Maislin, 497 U.S. at 126.

<sup>&</sup>lt;sup>19</sup> Owest Petition at 18-19.

<sup>&</sup>lt;sup>20</sup> See FCC High Speed Services for Internet Access: Status as of June 30, 2004, at Table 5—High-Speed Lines by Type of Provider (rel. Dec. 22, 2004) (hereinafter High-Speed Services Report).

requirements present no actual impediment to its service, and as such forbearance is not appropriate.

a. The Petition Fails To Show That, Absent Dominant Carrier Tariff Regulation, Charges Will Be Just And Reasonable And Qwest Will Not Engage In Unreasonable And Unjust Discrimination.

The first prong of the section 10 forbearance test requires the petitioner to demonstrate that "enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory." Qwest's primary argument under this prong is that "competition, where it exists, serves the Commission's statutory goal of ensuring fair and reasonable rates." Qwest's argument is insufficient under the first prong of section 10.

The existing regulatory regime for DSL transport services—under which ILECs are required to file tariffs and are subject to rate regulation and discounted resale requirements—has played a large role in creating the vibrant, competitive ISP market that provides consumers with a variety of choices of high-speed Internet access service. The premise behind these statutory requirements is that the ISP market will best flourish when all ISPs have non-discriminatory access to the transmission networks that make delivery of information services to their customers possible. One of the most important regulatory mechanisms to ensure the availability of competitive transmission services is the dominant carrier tariff filing process, which requires 15 days notice of tariff changes and

<sup>&</sup>lt;sup>21</sup> 47 U.S.C. § 160(a)(1).

<sup>&</sup>lt;sup>22</sup> Qwest Petition at 14.

a 30-day waiting period after a price change before implementing any further price change. In the context of ILEC DSL services, this process alerts ISPs, CLECs, and the Commission to any changes that would ultimately impact consumers of retail DSL-based Internet access service. The scrutiny of the tariff process uncovers efforts by ILECs to impose unreasonable or discriminatory terms on ISPs and CLECs. The process also allows wholesale ISP customers to adjust their business and marketing plans in light of any sudden service changes. Finally, the tariff process affords non-affiliated ISPs the opportunity to ensure that promotional offerings and similar discounts are afforded on a non-discriminatory basis, rather than used to favor the ILEC-affiliated ISPs.

Qwest's Petition fails to address or even acknowledge any of these important functions, and offers no analysis on how rates and terms to unaffiliated ISPs will remain just, reasonable and non-discriminatory. Because the Petition fails in all respects to address these considerations, it fails the first prong of the forbearance test.

### b. Dominant Carrier Tariff Regulation is Necessary for the Protection of Consumers.

The second prong of the section 10 forbearance test requires the petitioner to demonstrate that "enforcement of such regulation or provision is not necessary for the protection of consumers." Under this prong, Qwest argues that "consumers neither know nor care whether their provider is subject to dominant carrier tariff restrictions," and therefore that these requirements are not necessary to protect consumers. As stated above, ISPs and CLECs depend on these requirements to successfully manage their businesses. Whether retail consumers are aware of these restrictions or not has no

<sup>&</sup>lt;sup>23</sup> 47 U.S.C. § 160(a)(2).

<sup>&</sup>lt;sup>24</sup> Qwest Petition at 18.

relevance to the protection of these wholesale consumers and, in turn, of retail consumers as well. Without the benefits of dominant carrier tariff requirements, ILECs would have every incentive and ability to seek to eliminate independent ISPs from the competitive landscape, by offering retail products or terms that create a price squeeze on ISPs that use ILECs' underlying transmission services. Because ILECs control the access facilities and services that ISPs use as a wholesale input into their retail Internet access offering, price squeezing remains a real possibility, and as the D.C. Circuit noted, the evaluation of competition in a market demands that the Commission not "brush off" price squeeze issues.<sup>25</sup>

Qwest's second argument that the regulations in question are not necessary to protect consumers is that "if Qwest attempts to use freedom from dominant carrier regulation to harm consumers, Qwest's customers will simply turn to other providers." This argument is meritless for four reasons. First, particularly in the largely rural Qwest territory, it is often the case that there is no alternative provider. Second, there is nothing in the record that indicates how many of Qwest's customers in fact have a choice of alternate providers, or what the price differences would be if these consumers made the choice to switch. Third, where the competitive choice is cable, that "choice" is only to accept the cable company's chosen ISP or forego services completely. Finally, emerging technologies such as satellite, BPL, and wireless at this stage carry deployment and/or pricing disadvantages that limit their availability and affordability as mass-market alternatives. In short, as Qwest tacitly admits, the relief it seeks would in fact allow it to

<sup>&</sup>lt;sup>25</sup> Sprint Comm. v. FCC, 274 F.3d 549, 554 (2001).

<sup>&</sup>lt;sup>26</sup> Qwest Petition at 18.

harm consumers. The "protection" that it claims would remain for consumers is retail competition that exists, if at all, only to the extent that a duopoly constitutes competition. One is hard pressed to imagine that this is the sort of protection Congress had in mind when it enacted section 10(a)(2).

### c. Forbearance From Dominant Carrier Tariff Regulation is Not Consistent With the Public Interest.

Section 10(a)(3) of the Act requires a petitioner to demonstrate that "forbearance from applying such provision or regulation is consistent with the public interest." Section 10(b) of the Act states that in making a public interest determination, the Commission "shall consider whether forbearance from enforcing the provision or regulation will promote competitive market conditions, including the extent to which such forbearance will enhance competition among providers of such telecommunications service."

Qwest argues that forbearance is in the public interest because: 1) the 15-day notice requirement eliminates the possibility of surprising competitors, 2) the 30-day waiting period decreases price competition, and 3) the cost study requirement increases delay and expenses associated with the introduction of new services.<sup>29</sup> In making a public interest analysis, the Commission must decide whether the benefits of regulation, including the benefits of competition in the information services market that come from the enforcement of dominant carrier tariffs, are outweighed by specific and quantified

<sup>&</sup>lt;sup>27</sup> 47 U.S.C. § 160(a)(3).

<sup>&</sup>lt;sup>28</sup> 47 U.S.C. § 160(b).

<sup>&</sup>lt;sup>29</sup> Qwest Petition at 18.

harm to Qwest. Qwest, however, has provided no explanation of how, after years of compliance with these regulations, compliance has now become too burdensome. Nor has Qwest provided any explanation of how compliance now interferes with the introduction of new services. The burden falls on Qwest to provide the Commission with actual instances where the company has experienced harm. Qwest has not met this burden.

In making a public interest analysis, Qwest is incorrect to assert that forbearance from the dominant carrier tariff rules would enhance competition. To the extent that the competition at issue is that for "telecommunications services," as the statute states, there is no competition from cable companies on these services, because the Commission in its Cable Modem Declaratory Ruling concluded that the transmission underlying cable modem service is entirely an information service." Under an analysis that looks at competition among "telecommunications service providers," CLECs are currently the only potential competitors to Qwest. Inasmuch as the regulations from which Qwest seeks forbearance were enacted primarily for the benefit of CLECs and their customers, it is difficult to see how elimination of those regulations would increase competition from CLECs. Certainly Qwest has not explained how this would occur.

<sup>&</sup>lt;sup>30</sup> In the Matter of Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities, Declaratory Ruling, CS Docket No. 02-52, Aug. 6, 2002, at ¶ 39. In this regard, the support of certain ILECs—including SBC, BellSouth, and Verizon—for the FCC's position before the U.S. Supreme Court in Brand X Internet Services v. FCC, 345 F.3d 1120, 1132 (9th Cir. 2003), cert. granted (Dec. 3, 2004) (Nos. 04-277 & 04-281), is most puzzling. If the existence of cable-based transmission services is ever to support ILEC forbearance petitions, those cable-based services will have to be classified as "telecommunications services" under the Act.

Similarly, one of the provisions from which Qwest seeks forbearance is the prohibition on offering contract tariffs.<sup>31</sup> As Qwest itself notes, this requested relief is similar to relief available under the Commission's Phase II pricing flexibility regulations.<sup>32</sup> To obtain Phase II pricing relief, an ILEC must show that its competitors in a given marketplace have established significant market presence sufficient to preclude the ILEC from exploiting any individual market power. Specifically, the ILEC must show that its competitors have obtained a certain level of collocation in the ILEC's wire centers in a given study area.<sup>33</sup> Thus, the relief from the regulations prohibiting contract tariffs is already provided for by the FCC's collocation test. The fact that Owest is unable to obtain such relief is significant for two reasons. First, Qwest relies on the presumption that cable has established significant market presence in the provision of mass-market broadband services to support its argument that relief is necessary.<sup>34</sup> However, the only competition measured in the collocation test is wholesale competition, i.e., the ability of other carriers to provide services to their customers. As noted above, cable companies do not provide wholesale services to ISPs or CLECs. Thus, whatever competition they may provide in the "mass-market broadband services" marketplace. they provide none in the wholesale marketplace. As a result, because the Commission has already determined (albeit incorrectly) that the transmission underlying cable modem service is an information service, the Commission has no choice but to maintain that cable providers do not represent competition in the wholesale marketplace. Second.

<sup>&</sup>lt;sup>31</sup> Owest Petition at 14.

<sup>32</sup> Id. at 14, n. 63.

<sup>&</sup>lt;sup>33</sup> 47 C.F.R. § 69.709(c).

<sup>&</sup>lt;sup>34</sup> Qwest Petition at 14, n. 63.

because the collocation test measures wholesale competition, Qwest's inability to satisfy the requirements for Phase II pricing flexibility further supports the fact that there is not sufficient CLEC competition in the wholesale marketplace to merit forbearance.

Finally, neither Qwest nor the Commission can ignore the central role that independent ISPs have played in bringing choice and competition to consumers in the high-speed Internet access services market. ISPs are vital to the Commission's articulated goal of bringing affordable high-speed access to consumers. Forbearance from the tariffing process has the potential of allowing ILECs like Qwest to disadvantage independent ISPs or even to eliminate ISP competitors from the marketplace without any benefits to the public. For all of these reasons, Qwest's request for relief fails under the third prong of the forbearance analysis.

## III. THE COMMISSION MAY NOT FORBEAR FROM APPLYING ITS RATE AVERAGING REQUIREMENT TO QWEST'S \*DSL SERVICES.

Rate averaging requires that Qwest's tariffs "shall not contain charges...that are disaggregated or deaveraged within a study area." The primary policy behind rate averaging is to ensure that rates for rural areas "will not reflect the disproportionate burdens" associated with serving these so-called "high cost areas." Further, if prices are falling due to competition in high-traffic areas, then customers in rural areas should also benefit from lower prices. The Commission has a long and well-established rule

<sup>&</sup>lt;sup>35</sup> 47 C.F.R. § 69.3(e)(7).

<sup>&</sup>lt;sup>36</sup> In the Matter of Policy and Rules Concerning the Interstate, Interexchange Marketplace, Implementation of Section 254(g) of the Communications Act of 1934, As Amended, Report and Order, 11 FCC Rcd. 9564, at ¶ 3, 6 (1996).

 $<sup>^{37}</sup>$  *Id.* at ¶ 6.

that "the rates charged by all providers of interexchange telecommunications services to subscribers in rural and high cost areas shall be no higher than the rates charged by each such provider to its subscribers in urban areas." In its Petition, Qwest asks the Commission to stray from this rule and requests the freedom to charge different prices to consumers in urban areas, such as Denver, than to consumers in rural areas, such as the Colorado Rockies. As EarthLink demonstrates below, the request for such relief is not appropriate under section 10 of the Act.

a. The Petition Fails To Show That, Absent Rate Averaging
Requirements, Charges Will Be Just And Reasonable And Qwest Will
Not Engage In Unreasonable And Unjust Discrimination.

Qwest's primary argument as to why rate averaging is not necessary to ensure that rates and practices are just, reasonable, and nondiscriminatory is that retail consumers still have protections against unjust and discriminatory rates because, even without the rate averaging requirements, Qwest would still be subject to the remaining tariff rules and complaint processes. The section 208 complaint process entails substantial expenses and resource burdens, and as a result, such an alternative is not practical for the average consumer. The rate averaging requirements provide market-wide protection on reasonable and non-discriminatory rates that would not require any cost-prohibitive individual consumer complaints. For this reason, it is clear that the rate averaging safeguards currently in place provide consumers with more cost-efficient protection than

<sup>&</sup>lt;sup>38</sup> *Id.* at ¶ 9.

<sup>&</sup>lt;sup>39</sup> Qwest Petition at 21.

<sup>&</sup>lt;sup>40</sup> *Id.* at 20-21.

the alternatives provided by Qwest, and therefore Qwest's argument does not satisfy the requirements under section 10(a)(1) of the Act.

### b. Rate Averaging Requirements Are Necessary for the Protection of Consumers.

Qwest contends that rate averaging is not necessary for the protection of consumers because, were Qwest to use this relief to harm consumers, its customers would flock to its competitors. This argument fails for the simple reason that many of the consumers that stand to benefit from the Commission's rate averaging requirements, particularly consumers in rural areas, have few if any choices of high-speed Internet access providers where they are located. According to the Commission's most recent data, 13.8% of zip codes have only one high-speed provider, and another 16.8% of zip codes have a choice of only two providers. Qwest's argument that consumers could choose another provider if they are harmed ignores the fact that more than 30% of zip codes in this country lack any competitive alternatives in the high-speed Internet access service marketplace. Moreover, as noted in Section II(c), the "alternative," if there is one, is most likely the cable company, which likely only offers its own ISP. Again, this is a strange kind of "consumer protection." Nevertheless, the Petition neither acknowledges nor seeks to argue that this alternative is adequate to meet the second prong of the forbearance test.

<sup>&</sup>lt;sup>41</sup> *Id.* at 21.

<sup>&</sup>lt;sup>42</sup> See High Speed Services Report at Table 12 - Percentage of Zip Codes with High-Speed Lines in Service.

### c. Forbearance From Rate Averaging Requirements Are Not Consistent With the Public Interest.

Qwest claims that forbearance from rate averaging is consistent with the public interest for two reasons: 1) it will enhance competition by allowing Qwest to move its xDSL rates closer to actual costs, and 2) averaged rates create disincentives for Qwest to deploy its services in rural areas. As to whether deaveraging is in the public interest because it will allow Qwest to move its rates closer to actual costs, this assertion is unsupported. As Qwest itself asserts in its Petition, it is an incumbent LEC that serves both urban and rural areas. The costs to Qwest of providing service to rural areas, however high, is subsidized both by universal service and the revenue Qwest receives from subscribers in urban areas. Qwest provides no analysis of how these costs in fact balance out.

In response to Qwest's argument that the rate averaging requirements reduce incentives for entry in rural areas, Qwest never goes so far as to claim that rate averaging has actually slowed deployment in these rural areas. In fact, as recently as last year, Qwest's Chairman told state regulators that Qwest would be spending \$100 million in 2003 to extend broadband service to rural areas. In Arizona, one of the 14 states where Qwest's xDSL service is offered, the company reportedly spent as much as \$75 million to

<sup>&</sup>lt;sup>43</sup> Qwest Petition at 21-22.

<sup>&</sup>lt;sup>44</sup> *Id.* at 21.

<sup>&</sup>lt;sup>45</sup> Notebart Thanks States For Giving Qwest Chance to Help Itself, State Telephone Reg. Rep. (Aug. 1, 2003).

extend its DSL reach to 11 different rural areas within the state.<sup>46</sup> In a news article, Qwest claimed that the take rate in these areas was "exceptionally high" and cited an 18% increase in high-speed customers in Arizona from the previous year.<sup>47</sup> Therefore, even if rate averaging does somehow impede Qwest's deployment to rural areas, and the facts seem to suggest otherwise, the burden is on Qwest to prove that this is the case. It has not done so in its Petition.

### IV. THE COMMISSION MAY NOT FORBEAR FROM REQUIRING QWEST TO ENGAGE IN AVOIDED COST RESALE OF DSL TO CLECs.

Section 251(c) of the Act requires Qwest, and all ILECs, to resell its retail transmission services at an avoided cost discount.<sup>48</sup> In its Petition, Qwest suggests that it is not attempting to avoid all resale, but instead requests the "freedom to negotiate commercial agreements with its carrier customers."<sup>49</sup> As a threshold matter, Qwest's FCC Tariff No. 1 contains a broad range of volume and term discounts for wholesale DSL, indicating that Qwest has already implemented the flexibility it seeks here. Moreover, the language of that tariff claims that:

The telecommunications services offered under the *QWEST DSL* Volume Plan are provided at wholesale to carriers and non-carriers. The telecommunications services offered under the *QWEST DSL* Volume Plan are not services that the Company provides at retail, and accordingly, are

<sup>&</sup>lt;sup>46</sup> Max Jarman, *High-Speed Net Services Connect With Consumers*, Arizona Republic (Oct. 20, 2003) at D1.

<sup>&</sup>lt;sup>47</sup> Id.

<sup>&</sup>lt;sup>48</sup> 47 U.S.C. § 251(c).

<sup>&</sup>lt;sup>49</sup> Qwest Petition at 23.

not subject to the rate provisions of Sections 251 (c) (4) and 252 (d) (3) of the Communications Act, 47 U.S.C. §§ 251 (c) (4), 252 (d) (3). $^{50}$ 

Even if Qwest were correct that these are not the same services that it offers at retail, which it is not, the wholesale price requirement is nevertheless a critical safeguard against unreasonable wholesale pricing, and forbearance from 251(c) would have a serious negative effect on resale. For this reason, and the reasons below, forbearance from section 251(c) is not appropriate.

## a. The Requirements of Sections 251(c) and 271 Have Not Been Fully Implemented.

As an initial matter, section 10(d) provides that the Commission may not forbear from applying the requirements of section 251(c) or 271 until it determines that those requirements have been fully implemented.<sup>51</sup> Qwest contends that each relevant state commission where it offers its xDSL service has determined that Qwest has fully implemented the requirements of sections 251 and 271 with respect to all of its services.<sup>52</sup> The Commission should not consider section 10(d) satisfied until it can conclude that, within every relevant geographic market area, a robust wholesale market exists that enables competing providers to obtain access to the telecommunications services and facilities they require to offer end-users Internet access without the need for continued enforcement of sections 251(c) or 271. Qwest has failed to demonstrate that such a market exists in each of the 14 states with respect to Qwest's xDSL service. Until such a

<sup>&</sup>lt;sup>50</sup> Qwest Corp., Tariff F.C.C. No. 1, at 8.4.4, available at http://tariffs.qwest.com:8000/.

<sup>51 47</sup> U.S.C. §160(d).

<sup>52</sup> Qwest Petition at 27.

showing is made, Qwest has not satisfied the requirements of section 10(d). However, even if Qwest were to make such a showing, Qwest has not met the statutory criteria in order for the Commission to forbear from applying section 251(c), and Qwest's forbearance request should therefore be denied.

b. The Petition Fails To Show That, Absent Enforcement of Section 251(c), Charges Will Be Just And Reasonable And Qwest Will Not Engage In Unreasonable And Unjust Discrimination.

Qwest's primary argument under the first prong is that "[c]ompetition from multiple sources and technologies in the retail broadband market, most notably from cable modem broadband providers, will continue to pressure Qwest to utilize wholesale customers to grow its share of broadband markets." This argument fails first because the only real-world example of a facilities-based provider not forced to offer its wholesale customers reasonable rates and terms is cable, and the fact remains that cable companies by and large continue to refuse to sell their transmission services to unaffiliated ISPs. With the exception of Time Warner Cable, which is required to sell access to ISPs under conditions of the AOL Time Warner merger, no other cable company has chosen to expand its offerings to unaffiliated ISPs on any commercially meaningful scale. Companies in this position, rightly or wrongly, have decided to exclude competitors in an effort to maximize their own profits and retail market share. Consequently, the source of wholesale competition upon which Qwest almost entirely relies—cable—as a matter of indisputable fact offers no such competition at all.

Qwest gives no indication in its Petition that its cost-benefit analysis between maximizing wholesale sales and reducing competition in the information services market

<sup>&</sup>lt;sup>53</sup> Id. at 25.

will lead to a choice of the former over the latter. In fact, because Qwest supports the much-broader Petition of BellSouth for forbearance from applying all Title II common carriage requirements requiring ILECs to make available the transmission component of its wireline broadband Internet access service on reasonable and non-discriminatory terms, <sup>54</sup> the evidence seems to suggest that Qwest in fact intends to follow the path chosen so far by cable providers.

For a competitive wholesale product market to exist, the enforcement of section 251(c) is necessary. Because cable companies refuse to sell access to transmission service to ISPs and CLECs, cable is eliminated as a potential competitor to ILECs in the wholesale market. Thus, Qwest's assertion that such competition exists and that consumers would be protected by it is simply not true. Forbearance from section 251(c), the provision that Congress explicitly included to require ILECs to permit service by competitive LECs, would also presumptively eliminate CLECs in those marketplaces where wholesale facilities-based competition (from CLECs) arguably exists. The facts show that the forbearance requested by Qwest would essentially leave no competition in the wholesale transport marketplace for ISPs. Accordingly, the regulations are necessary to maintain reasonable and nondiscriminatory rates.

<sup>54</sup> Id. at 2-3.

#### c. Section 251(c) is Necessary for the Protection of Consumers.

Section 10(a)(2) requires the Commission to examine whether the regulation at issue is "not necessary for the protection of consumers." This examination must be more than just an exercise in theoretical economic forecasts, but instead must address how such forbearance will affect consumers today. Qwest contends that enforcement of section 251(c) is not necessary because consumers today have many competitive choices in the marketplace. Again, such an assertion is simply wrong. The fact is that there are only two significant carriers in the broadband transmission marketplace—cable and DSL. As of June 2004, FCC data showed that ADSL and cable accounted for 92.4% of all high-speed lines in the U.S., and 97.4% of all high-speed lines in the residential and small business market.<sup>56</sup> Therefore, despite Qwest's attempt to suggest that competition exists from technologies other than wireline and cable, such as wireless, satellite, and broadband over powerline ("BPL"),57 the simple truth is that wireless, satellite, and BPL technologies combined still comprise less than 3% of the overall high-speed connections provided to consumers.<sup>58</sup> It is also significant that ILECs control the majority of both fiber and wireless networks used to provide high-speed connections. Simply put, competition is not at this stage coming from multiple sources and technologies, and therefore does not serve to protect consumers in the manner that Qwest suggests.

<sup>&</sup>lt;sup>55</sup> 47 U.S.C. § 160(a)(2).

<sup>&</sup>lt;sup>56</sup> See High Speed Services Report at Table 1 – High Speed Lines and Table 3 – Residential and Small Business High Speed Lines.

<sup>&</sup>lt;sup>57</sup> Qwest Petition at 15-16.

<sup>58</sup> High-Speed Services Report at Chart 2—High-Speed Lines by Type of Provider.

### d. Forbearance From Section 251(c) is Not Consistent With the Public Interest.

In support of its public interest analysis, Qwest contends that forbearance from section 251(c) will enhance competition by allowing negotiation between competitors to set resale prices. As discussed above, forbearance from 251(c) would have the practical effect of eliminating the resale requirement entirely, because it would allow ILECs to charge ISPs unreasonable prices for their service by eliminating the competition check that arises from CLEC access to discounted wholesale rates. Just as EarthLink argued above in Section II(c), under a section 10(b) analysis, the forbearance requested here would in fact harm "competitive market conditions" and thwart "competition among providers of telecommunications services," because it would limit consumer choice and wholesale competition. The Commission itself has noted the public's interest in the promotion of advanced services across the DSL platform:

The Commission's determination [that advanced services sold at retail by incumbent LECs to residential and business end-users are subject to the section 251(c)(4) discounted resale obligation] should encourage incumbents to offer advanced services to Internet Service Providers at the lowest possible price. In turn, the Internet Service Providers, as unregulated information service providers, will be able to package the DSL service with their Internet service to offer affordable, high-speed access to the Internet to residential and business consumers. As a result, consumers will ultimately benefit through lower prices and greater and more expeditious access to innovative, diverse broadband applications by multiple providers of advanced services.

Thus, Qwest's analysis under the third prong of the forbearance test is not sufficient.

<sup>&</sup>lt;sup>59</sup> 47 U.S.C. § 160(b).

 $<sup>^{60}</sup>$  Advanced Telecommunications Capability Second R&O at  $\P$  3.

#### **CONCLUSION**

EarthLink respectfully urges the Commission to maintain the current regulatory framework for the ILEC provision of DSL services to unaffiliated ISPs and CLECs. For the foregoing reasons, Qwest's Petition should be denied.

Respectfully submitted,

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January 6, 2005

## **EXHIBIT C**

# Before the FEDERAL COMMUNICATIONS COMMISSION Washington, DC 20554

In the Matter of	)	
	)	
Petition of Qwest Corporation for Forbearance	)	WC Docket 04-416
Pursuant to 47 U.S.C. §160(c) Pertaining to	)	
Qwest's xDSL Services	)	

#### REPLY COMMENTS OF EARTHLINK, INC.

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# Before the FEDERAL COMMUNICATIONS COMMISSION Washington, DC 20554

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#### REPLY COMMENTS OF EARTHLINK, INC.

#### **INTRODUCTION AND SUMMARY**

Unlike the similar forbearance petitions filed by BellSouth and Verizon that seek broad forbearance from the application of all Title II and Computer Inquiry requirements, on its face Qwest's Petition seemingly requests only targeted relief from certain common carrier provisions found in Title II of the Communications Act.

Specifically, Qwest has asked the Commission to forbear from applying dominant carrier tariff regulations, rate averaging requirements, and the requirements to resell at an avoided cost discount. However, contrary to Qwest's assertion that it somehow only

<sup>&</sup>lt;sup>1</sup> Petition of BellSouth Telecommunications, Inc. For Forbearance Under 47 U.S.C. §160(c) From Application of Computer Inquiry and Title II Common Carrier Requirements, WC Docket No. 04-405 (filed Oct. 27, 2004); In the Matter of Petition of Verizon Telephone Companies For Forbearance Under 47 U.S.C. §160(c) From Title II and Computer Inquiry Rules With Respect To Their Broadband Services, WC Docket 04-440 (filed Dec. 20, 2004).

<sup>&</sup>lt;sup>2</sup> Qwest Petition at 3.

seeks relief in "narrow" pricing areas,<sup>3</sup> its request in fact covers much of the same ground as the forbearance petitions of the other ILECS.<sup>4</sup> Because Qwest declared in its Petition that it "supports and joins BellSouth's recently-filed forbearance Petition,"<sup>5</sup> it is clear that it is the company's intention to use any "narrow relief" granted by the Commission to achieve the same anti-competitive and anti-consumer goals sought by BellSouth and Verizon.<sup>6</sup> As EarthLink and others stated in the opening round of comments, if the Commission grants Qwest's relief as requested, Qwest will be authorized to use this relief to avoid tariff requirements and to demand discriminatory rates and terms for the transmission component of its xDSL service. Indeed, just as in the BellSouth forbearance proceeding, forbearance from the regulations under consideration here would threaten the ability of independent ISPs and CLECs to obtain the essential wholesale transmission service that makes delivery of high-speed Internet access services to their consumers possible. Without these regulations, Qwest would have both the ability and incentive to foreclose competition from these independent ISPs and CLECS, leaving consumers in Owest territory with little or no choice of high-speed Internet service providers.

<sup>&</sup>lt;sup>3</sup> Id. at 3.

<sup>&</sup>lt;sup>4</sup> In its opposition to the BellSouth forbearance petition, EarthLink gave several reasons why there is no basis for forbearance from the core common carrier provisions in the Communications Act applicable to the transmission component of ILEC high speed Internet access services. Rather than repeat those arguments at length here, EarthLink incorporates them by reference in this proceeding. See EarthLink Comments, Petition of BellSouth Telecommunications, Inc. For Forbearance Under 47 U.S.C. §160(c) From Application of Computer Inquiry and Title II Common Carrier Requirements, WC Docket No. 04-405 (filed Dec. 20, 2004).

<sup>&</sup>lt;sup>5</sup> Owest Petition at 2.

<sup>&</sup>lt;sup>6</sup> See AT&T Comments at 1-2; Federation of Internet Solution Providers of America Comments at 3-4; Time Warner Telecom Comments at 5-6; Washington Bureau for ISP Advocacy Comments at 4-5.

As pointed out in EarthLink's opening comments, and supported by the majority of commenters in this proceeding, there are three fatal flaws in Qwest's Petition which should control the Commission's disposition of this proceeding:

- 1. Qwest provides no tangible evidence that dominant carrier tariff, rate averaging, and avoided cost discount requirements have reduced incentives, created barriers to entry, or slowed the deployment of any its services. Citing only the possibility of delays and expenses, Qwest has failed to address any substantive harm that these requirements have had on its ability to offer existing or new services to consumers in a timely fashion. In fact, the empirical evidence shows that these requirements, in addition to helping create a competitive ISP marketplace, present no actual impediment to Qwest's services. Forbearance therefore is not appropriate.
- 2. Qwest's Petition relies solely on evidence regarding retail competition, while providing no discussion or analysis on the level of competition in the provision of wholesale transmission services. Because there is little competition in the wholesale transmission service market, and ISPs depend upon wholesale transmission services in order to offer retail competition in Internet access services, the Commission must evaluate the impacts of the wholesale transmission market on the very retail competition which Qwest cites as justification for the forbearance it seeks. The Petition provides no evidence of the state of competition in the wholesale marketplace, and it grossly understates the market power that ILECs like Qwest retain in this market. For these reasons, the Commission must deny the Petition.
- 3. Qwest relies on the argument that "robust intermodal competition" in the retail services marketplace satisfies all three prongs of the section 10 forbearance test. It does not. Under section 10, a petitioner must make three "conjunctive" showings that forbearance is appropriate, and in the absence of such a record, the Commission should "deny a petition for forbearance if it finds that any one of the three prongs are unsatisfied." Because Qwest has failed to make these showings, its Petition must be denied.

For all these reasons, Qwest has not met the burden of showing that forbearance from the requested requirements is appropriate. As such, the Commission should continue to enforce dominant carrier tariffing and tariff review, and to require that Qwest

<sup>&</sup>lt;sup>7</sup> Qwest Petition at 13, 20, 33.

<sup>&</sup>lt;sup>8</sup> CTIA v. FCC, 330 F.3d 502, 509 (D.C. Cir. 2003).

continue to sell transmission service at an avoided cost discount to CLECs. Accordingly, the Petition must be denied.

I. THE COMMISSION MUST DENY THE PETITION BECAUSE QWEST HAS NOT PROVIDED TANGIBLE EVIDENCE OF SUBSTANTIVE HARM SUFFICIENT TO JUSTIFY FORBEARANCE FROM DOMINANT CARRIER TARIFF REGULATION, RATE AVERAGING, AND AVOIDED COST RESALE REQUIREMENTS.

As EarthLink stated in its comments, the existing regulatory regime for DSL transport services—under which ILECs are required to file tariffs and are subject to rate regulation and discounted resale requirements—has played a large role in creating the vibrant, competitive ISP market that provides consumers with a variety of choices of high-speed Internet access service. The premise behind these statutory requirements is that the ISP market will best flourish when all ISPs have non-discriminatory access to the transmission networks that make delivery of information services to its customers possible. Some of the most important regulatory mechanisms to ensure the availability of competitive transmission services are those for which Qwest now seeks forbearance.

The dominant carrier tariff and avoided cost discount requirements that Qwest requests the Commission to forbear from applying to its xDSL services serve several necessary functions: they alert ISPs, CLECs, and the Commission to any changes that would ultimately impact consumers of retail DSL-based Internet access service; they allow wholesale ISP customers to adjust their business and marketing plans in light of

<sup>&</sup>lt;sup>9</sup> See EarthLink Comments at 8; see also AT&T Comments at 2-3; Federation of Internet Solution Providers of America Comments at 2 ("[I]ndependent ISPs have long been the engine hidden beneath the hood of the car driving the Internet and broadband revolutions."); Washington Bureau for ISP Advocacy Comments at 2 ("[T]he independent ISP industry [is] the very industry that gave rise to the Internet, stimulated its widespread deployment, and on whose back this nation's information economy is now solidly based.").

any sudden service changes; and, perhaps most importantly, they are critical safeguards against unreasonable wholesale pricing and serve to expose efforts by ILECs to impose unreasonable or discriminatory terms on ISPs and CLECs. Despite the obvious need for these requirements, Qwest asks the Commission to forbear from applying them to its xDSL service without providing any evidence of the substantive harm that the requirements allegedly have on Qwest's ability to offer existing or new services to consumers in a timely manner. The burden is on Qwest to do so. Instead, Qwest cites only the *possibility* of delays and expenses that are associated with tariff filing, <sup>10</sup> but offers no actual examples of such delays or expenses, or how they affect Qwest's ability to offer its services to its subscribers. In fact, the evidence suggests that the ADSL service that is subject to these requirements has had enormous success over its "non-regulated" CLEC counterparts. Recent FCC data shows that, of all ADSL lines, ILECs have a 95% market share compared to a 5% share for CLECs. <sup>11</sup>

Similarly, the rate averaging requirements from which Qwest seeks forbearance ensure that the rates charged by telecommunications carriers in rural and high cost areas will not be higher than the rates charged by the same provider to its subscribers in urban areas. Qwest's argument, however, that averaged rates create disincentives for Qwest to deploy its services in rural areas, <sup>12</sup> is simply not supported by any evidence in the

<sup>&</sup>lt;sup>10</sup> Qwest Petition at 18-19.

<sup>&</sup>lt;sup>11</sup> See FCC High Speed Services for Internet Access: Status as of June 30, 2004, at Table 5—High-Speed Lines by Type of Provider (rel. Dec. 22, 2004) (hereinafter High-Speed Services Report).

<sup>&</sup>lt;sup>12</sup> Qwest Petition at 21-22.

Petition.<sup>13</sup> In fact, as EarthLink demonstrated in its comments, there is evidence to the contrary that suggests Qwest has made large financial commitments to deploy its broadband services to the rural areas within its territory.<sup>14</sup> Simply put, even before the Commission addresses whether Qwest has met its burden under section 10 of the Act, without evidence that Qwest actually needs the relief it is requesting, the Commission must deny the Petition.

# II. THE COMMISSION MUST DENY THE PETITION BECAUSE IT FAILS TO PROVIDE ANY ANALYSIS ON THE LEVEL OF COMPETITION IN THE PROVISION OF WHOLESALE TRANSMISSION SERVICES.

The majority of comments in this proceeding also recognized that the Petition—likely by design—mischaracterizes the relevant marketplace. Qwest's Petition relies solely on evidence regarding *retail competition*, while providing virtually no discussion or analysis on the level of competition in the provision of *wholesale transmission* services. It is wholesale competition that is necessary to ensure that competitive services continue to reach end users. Perhaps the central issue for independent ISPs and CLECs in this proceeding—as well as the other ILEC forbearance proceedings—is whether there are alternative safeguards within the *wholesale* product market sufficient to

<sup>&</sup>lt;sup>13</sup> See Covad comments at 8 ("[D]eregulation...has not resulted in any increased or innovative investments by the incumbents-rather, it has simply set the stage for their remonopolization...").

<sup>&</sup>lt;sup>14</sup> See EarthLink Comments at 17-18 (citing sources showing that Qwest spent \$100 million in 2003 to extend its xDSL service to rural areas).

<sup>&</sup>lt;sup>15</sup> See AT&T Comments at 9 ("Qwest does not even attempt to demonstrate the existence of meaningful competition for wholesale last-mile broadband transmission facilities and services..."); COMPTEL/ASCENT Comments at 7 ("Qwest's failure to properly identify the relevant product and geographic markets, much less prove that it lacks market power therein, is fatal to its Petition."); ITAA Comments at 3 ("Qwest, however, has completely ignored the wholesale broadband market."); Time Warner Telecom Comments at 3 ("Qwest never defines either the product or geographic markets for 'mass market' broadband services with any precision."); Washington Bureau for ISP Advocacy Comments at 5 ("What Qwest conveniently ignores is the wholesale broadband access market...").

protect against unreasonable or discriminatory rates and practices by ILECs—and in particular large ILECs like Qwest—in the absence of the requirements that mandate that ILECS make available the transmission underlying their broadband Internet access service. The Petition offers no discussion whatsoever on this central question. It provides no evidence of the state of competition in the wholesale marketplace, and it grossly understates the market power that ILECs like Qwest retain in this market. <sup>16</sup>

Moreover, the Petition fails to discuss how forbearance would adversely impact competition in the retail services market because the wholesale marketplace for underlying transmission services is not competitive. The reality is that ILECs serve 95% of xDSL customers, so in the vast majority of cases independent ISPs must depend on ILEC facilities to reach its end users. Forbearance from all Title II provisions would eliminate what little competition in the wholesale marketplace there is today. As a result, the retail marketplace would be reduced to only two players—cable providers and ILECs. By eliminating wholesale competition, forbearance from the regulations in question would produce, at best, a duopoly market for broadband Internet access services. Such a result harms not only independent ISPs, but ultimately the retail consumer who will be denied a competitive choice in this market.

Qwest's only argument with respect to the wholesale transmission services marketplace is that "[c]ompetition from multiple sources and technologies in the retail

<sup>&</sup>lt;sup>16</sup> See ITAA Comments at 5-6 (ILECs retain substantial market power in the wholesale marketplace and therefore have the ability to subject rival ISPs to a "price squeeze.").

<sup>&</sup>lt;sup>17</sup> See AT&T Comments at 9 ("In the vast majority of cases, non-affiliated providers of broadband services and applications...simply do not have any way of providing their competitive services without access to ILEC last-mile facilities, because they rarely have access to competitive alternatives outside the incumbents' networks.").

broadband market, most notably from cable modem broadband providers, will continue to pressure Qwest to utilize wholesale customers to grow its share of broadband markets." This argument fails because cable is the only real-world example of what will happen absent the Title II requirements which Qwest is asking the Commission to forbear from applying. The fact is that cable companies almost uniformly refuse to sell their transmission services to unaffiliated ISPs. With the exception of Time Warner Cable, which is required to sell access to a limited number of ISPs under conditions of the AOL Time Warner merger, no other cable company makes transmission services available to unaffiliated ISPs on any commercially meaningful scale. The Commission's continued refusal to apply common carrier regulation to cable modem services has permitted cable companies to exclude competitors in an effort to maximize their own profits and retail market share.

Consequently, the source of wholesale competition upon which Qwest almost entirely relies—cable—as a matter of indisputable fact offers no such competition at all. Further, because Qwest supports the much-broader petitions of BellSouth and Verizon for forbearance from applying all Title II common carriage requirements requiring ILECs to make available the transmission component of its wireline broadband Internet access service on reasonable and non-discriminatory terms, <sup>21</sup> the evidence before the

<sup>&</sup>lt;sup>18</sup> Qwest Petition at 25.

<sup>&</sup>lt;sup>19</sup> See Covad Comments at 6 (Actual marketplace evidence confirms that cable does not complete with ILECs in the broadband marketplace).

<sup>&</sup>lt;sup>20</sup> EarthLink and others have consistently opposed the Commission's refusal to apply common carrier requirements to cable. *See Brand X Internet Services v. FCC*, 345 F.3d 1120, 1132 (9th Cir. 2003), *cert. granted* (Dec. 3, 2004) (Nos. 04-277 & 04-281).

<sup>&</sup>lt;sup>21</sup> *Id.* at 2-3.

Commission strongly suggests that, if forbearance were granted, Qwest in fact intends to follow the discriminatory path chosen so far by cable providers.

## III. THE COMMISSION MUST DENY THE PETITION BECAUSE IT DOES NOT MEET THE REQUIREMENTS FOR FORBEARANCE UNDER SECTION 10 OF THE COMMUNICATIONS ACT.

In its Petition, Qwest argues that the existence of "robust intermodal competition" in the broadband services marketplace satisfies all three prongs of the section 10 forbearance test. <sup>22</sup> It does not. Because the section 10 test is stated in the conjunctive, before the Commission may lawfully forbear from applying any of the Act's provisions, the petitioner must satisfy each of the three parts of that test. First, the petitioner must show that the enforcement of the identified requirements for the specific services at issue "is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory. <sup>23</sup> Second, it must show that the enforcement of the identified requirements "is not necessary to protect consumers. <sup>24</sup> Third, it must show that the non-enforcement of the identified requirements "is consistent with the public interest," including consideration of whether such forbearance will promote "competitive market conditions. <sup>25</sup> The Petition does not satisfy any of these statutory criteria.

<sup>&</sup>lt;sup>22</sup> See Qwest Petition at 13, 20, 23.

<sup>&</sup>lt;sup>23</sup> 47 U.S.C. § 160(a)(1).

<sup>&</sup>lt;sup>24</sup> 47 U.S.C. § 160(a)(2).

<sup>&</sup>lt;sup>25</sup> 47 U.S.C. § 160(a)(3) and (b).

Although the existence of competition may be relevant to the analysis under each part, the mere presence of competition in and of itself is not sufficient to satisfy the requirements under section 10. The language of section 10(b) provides that the Commission must consider "competitive market conditions" in making a public interest determination under section 10(a)(3), and further provides that a finding that forbearance would enhance competition among providers of telecommunications services "may be the basis of a Commission finding that forbearance is in the public interest." <sup>26</sup> Thus, under section 10(b), although the Commission must consider the effect on competition, a finding that forbearance will enhance competition is not dispositive even under a third prong analysis. The specific reference in section 10(b) to section 10(a)(3) demonstrates that a finding that forbearance would enhance competition—without more—is not adequate to satisfy the requirements under the first two parts of the test set forth in section 10(a)(1) and 10(a)(2). Therefore, because Qwest relies on the premise that competition by itself is sufficient to satisfy a forbearance analysis, the Petition is inadequate on its face, and for this reason alone it should be denied.

Particularly in this case, where granting forbearance would significantly reduce or eliminate any competition in the provision of wholesale transmission services, and thereby reduce retail competition in the provision of broadband Internet access services, it is clear that the public interest would not be served. Moreover, as discussed above, continued application of the Title II requirements for which forbearance is sought clearly is necessary to ensure that Qwest does not engage in discriminatory practices towards

<sup>&</sup>lt;sup>26</sup> 47 U.S.C. § 160(b) (emphasis added).

independent ISPs, to protect consumer access to independent ISP services, and to promote competition in the ISP marketplace. As a result, Qwest's Petition fails each of the three statutory tests and should be denied.

#### **CONCLUSION**

Qwest has not met its burden of satisfying the statutory requirements for forbearance under section 10 of the Act. The prevention of unreasonable and discriminatory practices, protection of consumers' interests, and the public interest all demand that the transmission component of wireline broadband services provided by Qwest and other ILECs remain available on reasonable and non-discriminatory terms under Title II of the Communications Act. EarthLink respectfully urges the Commission to maintain the current regulatory framework for the ILEC provision of wholesale DSL services to unaffiliated ISPs and CLECs. For the foregoing reasons, Qwest's Petition should be denied.

### Respectfully submitted,

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